No. 12400

In the United States Court of Appeals for the Ninth Circuit

DWIGHT H. THOMASON, FRANCIS E. ANTILLA, CLAYTON BROWN, BENEDICT KLAKOWICZ, AND HOWARD SIMON, PLAINTIFFS-APPELLANTS,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the District Court, Honorable Louis E. Goodman, United States District Judge (R. I: 32-34), is reported at 85 F. Supp. 742.

JURISDICTION

Appellants filed a civil action on October 22, 1947, asking recovery of additional compensation for official services as civilian seamen of the United States Army Transport Service during the period May 1944 to August 1945 (R. I: 1-20). The jurisdiction of the district court was invoked under the Tucker Act, former 28 U. S. C. 41 (20), now 28 U. S. C. 1346 (a).

The judgment of the district court dismissing appellants' complaint was entered August 15, 1949 (R. I: 34).

The notice of appeal was filed October 9, 1949 (R. I: 35). The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATUTES, REGULATIONS AND DECISIONS INVOLVED

A. The pertinent jurisdictional provisions of the Public Vessels, Suits in Admiralty and Tucker Acts are reprinted in Appendix A, *infra,* pp. 48-49.

B. The pertinent statutes and regulations relating to appellants' appointment as officers of the United States are reprinted in Appendix B, *infra,* pp. 50-61.

C. The pertinent regulations relating to the appellants' right to overseas bonus and overtime are reprinted in Appendix C, *infra,* pp. 62-71.

D. The pertinent decisions of the Maritime War Emergency Board and the related correspondence are printed in Appendix D, *infra,* pp. 72-80.

E. The unreported decision on the merits in *Jentry* v. *United States,* (S. D. Calif.) is reprinted in Appendix E, *infra,* pp. 81-83.

F. Various unreported decisions relating to the exclusion of suits for compensation for official service from the Tucker Act jurisdiction of the district courts are reprinted in Appendix F, *infra,* pp. 84-97.

STATEMENT

This case was tried to the district court, Honorable Louis E. Goodman, sitting in admiralty. It was heard on the complaint and answer together with the testimony of appellant Thomason (R. II: 3-63) and the deposition of appellants' witness O'Connor which was received over the Government's objection (R. II: 28-29). The Government offered no testimony but filed copies of libelant Thomason's oath of office, application for appointment, report of termination and related documents and asked the court to take notice of the applicable regulations. Upon the conclusion of appellants' case at the trial, the Government renewed its motion to dismiss (R. I: 33). The district

court granted the motion and ordered the complaint dismissed both for absence of jurisdiction and for failure to state a cause of action (R. I: 32-34).

Appellants' complaint purports to invoke jurisdiction under the Tucker Act (R. I: 7). It alleges service on various government-operated vessels. It does not allege, however, whether these public vessels were "employed as merchant vessels" or exclusively as public vessels, which never at any time carried privately owned cargo or commercial passengers. Appellants' pleadings and proof alike contain nothing to negative jurisdiction under the Suits in Admiralty Act. On the other hand, jurisdiction under the Public Vessels and Suits in Admiralty Acts taken together is fully established by both pleading and proof.

Appellants' complaint as filed included six distinct claims: (1) area bonus at the rate of $5 per day (R. I: 2-3); (2) vessel attack bonus for each time their vessel was bombed (R. I: 5); (3) overtime pay for holiday work at the rate of 85 cents per hour (R. I: 3-4); (4) overtime pay for services in taking their vessels from the United States to the European Theater of Operations and from the theater back to the United States (R. I: 5); (5) payment in lieu of sick and annual leave not taken (R. I: 4); (6) refund of retirement deductions (R. I: 4, 6-7). During the course of the trial, however, it appears that all of the claims except those for area bonus and for holiday overtime were withdrawn. Thus it was conceded that appellants had not become entitled to vessel attack bonus (R. II: 62-63); that overtime compensation was not due under their contract for working to and from the European theater (R. II: 63); that appellant Thomason had received payment for his accrued annual leave (R. II: 52-53, 57); and that his retirement deductions had been refunded (R. II: 53).

The only issues left for decision of the court below were thus the question of jurisdiction and that of appellants' right to bonus and overtime. The pertinent facts of ap-

pellants' case on these issues can be easily summarized from the pleadings and the findings of the court.

Appellants were appointed by the Secretary of War pursuant to the Constitution and statutes (*infra,* pp. 50-52) to their several official positions as seamen of the United States Army Transport Service (R. I: 33). They accepted appointment and executed their required oaths of office as inferior officers of the United States serving in that establishment (R. I: 33). Like all government employees appointed for service overseas, they were also required to execute a supplemental overseas employment contract whereby they agreed further that, unless sooner relieved at the pleasure of the Government, they would serve "at any post of duty in the world, to be determined by the Government, * * * for a period of one year from the effective date of arrival" at their overseas posts of duty (R. I: 9).

Appellants entered upon the performance of duty pursuant to their several oaths of office on various dates during May and July 1944. They proceeded to the European Theater of Operations, as agreed in their overseas contracts. There they served on various Army tugs and related small craft, and on the expiration of their overseas contracts, returned to the United States on various dates in July and August 1945. Appellants were paid their official compensation as officers of the United States at the basic rates named in their overseas contracts together with the agreed one hundred percent overseas-bonus in lieu of all other bonuses. The applicable regulations (Appendix C, *infra,* pp. 62-71) did not authorize payments of area and attack bonus or overtime but provided that payment of base wages with one hundred percent overseas bonus was to be in lieu of all bonus, and that base pay had been fixed to cover expected overtime and compensatory time off at the convenience of the Government was to be given in lieu of all unexpected overtime.

Appellants accordingly were not paid any such additional sums for overtime or bonus. They made no protest

to the authority responsible for payment of their compensation, but merely advised the masters of their vessels of the extent of their overtime (R. II: 37-40).

In dismissing appellants' complaint for both want of jurisdiction and failure to state a cause of action, Judge Goodman stated (R. I: 33-34):

> It is not amiss to point out that Thomason, on the witness stand, before the introduction of the documents denied execution of the oath of office and application for civil service employment. But the documents admittedly demonstrate the incorrectness of his statement in that regard.
>
> The evidence fully proves that the plaintiff Thomasson was appointed by the head of a Department of the United States and was therefore an "officer of the United States." Consequently the Court does not have jurisdiction of this cause under the Tucker Act. See authorities cited in the Order Reserving Ruling, of October 22, 1948.
>
> I am further of the opinion that the Court does have jurisdiction of this cause under the Public Vessels Act. 46 USCA 781; Canadian Aviator, v. U.S. 324 U. S. 215; Amer. Stevedores, Inc., v. Porello, 330 U.S. 446; Loyola v. United States, (9th Cir.) 161 F. 2d 126; Jentry v. U.S. 73 F. Supp. 899.
>
> However it would be unavailing for plaintiffs to proceed under the Public Vessels Act inasmuch as the complaint having been filed more than two years after the claims arose, it is barred under the provisions of 46 USC 745. Kakara v. U.S. (9th Cir.) 157 F. 2d 578; Crescitelli v. U.S. (3d Cir.) 159 F. 2d 377; Piascik v. U.S. 65 F. Supp. 430.
>
> Furthermore, I am of the opinion, after examining the contract of employment, that it is plain and unambiguous. For the reasons stated by Judge Bondy in Henderson v. U.S. 74 F. Supp. 343, plaintiffs are not entitled, under the contract terms, to recover what they seek.

From this order of dismissal the present appeal was timely taken.

SUMMARY OF ARGUMENT

This case involves both a question as to appellants' right to invoke the jurisdiction of the district court and a question as to appellants' right to recover on the merits. In respect of the jurisdictional question, this is a companion to the case of *United States, Appellant,* v. *William P. Thornton,* No. 12428, now pending in this Court. In that case the district court, like the court below in the present case, followed established law and held exclusive jurisdiction of wage suits by civil-service employees of the United States, serving as seamen on its public vessels, was under the Public Vessels and Suits in Admiralty Acts. Appellants Thomason et al. in this case contend that there is no jurisdiction of such actions under the Public Vessels and Suits in Admiralty Acts. It is elementary that attorneys for the Government may not voluntarily consent to jurisdiction. We therefore felt compelled to appeal in the *Thornton* case, although the decision of the district court followed what we believe to be the correct rule.

Both district courts, correctly in our view, held that exclusive jurisdiction of suits for official compensation by civil-service employees of the United States, serving as seamen on public vessels, is under the Public Vessels and Suits in Admiralty Acts. We believe this result is required by prior decisions of this Court and of the Supreme Court. Appellants' present suit invoking jurisdiction under the Tucker Act was therefore correctly dismissed. It was filed after the expiration of the two-year statute of limitations of the Public Vessels and Suits in Admiralty Acts and could not be transferred to the admiralty docket. We further believe that the court below correctly held that appellants were "inferior officers" of the United States as a result of their appointment as regular civil-service employees. As such, they were prohibited from bringing this suit on the law side of the district court because of the exception from district court Tucker Act jurisdiction of suits by officers for official compensation.

I. The literal language of the Public Vessels Act as applied by decisions of this Court and the Supreme Court

fully establishes jurisdiction of seamen's suits for compensation of all kinds. *United States* v. *Loyola* (9th Cir.), 1947 A.M.C. 994, 161 F. 2d 126; *American Stevedores* v. *Porello,* 1947 A.M.C. 349, 330 U. S. 446; *Canadian Aviator, Inc.* v. *United States,* 1945 A.M.C. 265, 324 U. S. 215. This view is now supported by the decision of three district courts. *Jentry* v. *United States* (S.D. Calif.), 1948 A.M.C. 58, 73 F. Supp. 899; *Henderson* v. *United States* (S.D. N.Y.), 1947 A.M.C. 1371, 74 F. Supp. 343; and *Thomason et al.* v. *United States* (N.D. Calif. 1948), 85 F. Supp. 742. Jurisdiction of wage suits under the Suits in Admiralty Act has long been accepted. The same rule has been followed under the Public Vessels Act, which amended and supplemented the Suits in Admiralty Act. It is frequently impractical to determine whether a vessel is employed as a "merchant vessel" or employed exclusively as a "public vessel," it is neither just nor practical to make admiralty jurisdiction of wage suits depend on the accidents of operation. Recovery should be had in admiralty without proof as to whether the public vessel involved was or was not carrying some commercial cargo or passengers. This is particularly so since it is established by *Matson Navigation Co.* v. *United States,* 1932 A.M.C. 202, 284 U. S. 352, that where admiralty jurisdiction of a suit against the United States is available it is exclusive. Appellants demand that this Court reject this established jurisprudence. This comes with singular ill grace from them. The difficulty in which they find themselves is due solely to their failure to bring suit within the two-year limitation period. Yet they do not even offer any excuse for their laches.

II. Appellants ask this Court to overrule its prior decision and the decisions of other courts which have established the meaning of the exception from the Tucker Act jurisdiction of the district court of suits for official compensation. See *Oswald* v. *United States* (9th Cir., 1938), 96 F. 2d 10; *United States* v. *McCrory* (5th Cir., 1899), 91 Fed. 295; *Callahan* v. *United States* (D.C. Cir., 1941), 122 F. 2d 216. Those decisions establish that regular civil-service employees, such as appellants, are "inferior officers" of the United States. They are appointed by authority of the head

of their department; they execute the required oath of office; they make the required affidavit that they have not paid for their appointments as officers of the United States.

The rule established by the decisions accords with the legislative history of the exception from district court Tucker Act jurisdiction of suits for official compensation. As enacted in 1887, the Tucker Act contained no such exception from district court jurisdiction. In 1898, however, because of the tremendous flood of suits for overtime by letter carriers and navy yard mechanics as a result of the eight-hour laws enacted in 1888 and 1892, Congress determined to concentrate in the Court of Claims all suits for salaries, overtime and fees. It amended the Tucker Act so as to withdraw such cases from district court jurisdiction. Congress reenacted the exception in 1911 and 1948 without substantially changing the language.

It is familiar that the same word may be used with different meanings in different acts and even in different parts of the same act. This has been particularly true with the word "officer." Thus the Supreme Court held that a navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat,* (1888) 124 U. S. 303), but, in a decision handed down the same day, it also held that such a clerk was an "officer" for the different purposes of a different statute (*United States* v. *Hendee,* (1888) 124 U. S. 309). See also *Steele* v. *United States No. 2,* (1925) 267 U. S. 505. Reenactment confers Congressional sanction that the courts' interpretation of the term "officer" in the Tucker Act exception was correct. Appellants particularly should not be heard to question the established interpretation. They did not have to sue in the Court of Claims, but could within two years have maintained their suit in the district court in admiralty under the Public Vessels and Suits in Admiralty Acts. Their own laches is the sole cause of their difficulty.

III. Appellants were paid compensation on a different basis than that of seamen serving on different vessels not operated by the Army. Their base wage was higher and they received a 100 percent continuous overseas bonus.

Bonus was paid regardless of whether their vessels were in drydock or in a safe port instead of on the high seas subject to enemy attack. This was contrary to other seamen who were paid bonus only when exposed to enemy attack at sea. Having first obtained the advantage of their higher rate of basic compensation and of the continuous payment of overseas bonus not available to other seamen, appellants now seek also to obtain bonus and overtime paid to other seamen employed on a different and lower basis of compensation. Their supplemental overseas contracts foresaw the possibility of just such controversies. Their contracts accordingly made express provision that the higher rate of pay and the 100 percent overseas bonus should be in lieu of all other rights.

Appellants contend the court below was mistaken in holding their overseas contracts unambiguous. If this Court should agree with appellants and hold that the contract is ambiguous, it may take judicial notice of applicable regulations which show conclusively that the district court's interpretation of the contract was correct. We have printed these regulations in the appendix and we discuss them in detail in our argument.

We believe that the court below correctly dismissed appellants' suit both for want of jurisdiction and on the merits. We submit that this Court should therefore affirm.

ARGUMENT

I

The Settled Practice, the Controlling Cases, and the Clear Language of the Public Vessels Act Establish That Appellants' Remedy in Admiralty Was Exclusive and Required the District Court to Dismiss Appellants' Attempted Tucker Act Suit

Appellants failed to follow the established practice and bring suit in admiralty for their wages as civil-service seamen of the United States within the two-year limitation of the Public Vessels and Suits in Admiralty Acts, 46 U. S. Code 782, 743. After the expiration of the two-year limitation, they brought this suit under the Tucker

Act, seeking the advantage of its six-year limitation. The court below dismissed.

Appellants now ask this Court to overturn the settled practice, overrule its prior cases and permit their tardy recovery under the Tucker Act. We believe that the public interest in simplification of litigating procedures requires adherence to the settled cases and the established practice. This is particularly true here since appellants have neither justification for their laches nor any merit to their claim.

A. *Under the practice established by the controlling decisions of this and other courts it is immaterial to legal rights whether the public vessels involved are employed as merchant vessels or as exclusively public vessels.*

To understand appellants' contention, the vessel operating practices of the United States must be understood. Public vessels of the United States manned by civil-service masters and crews are employed according to need in two different types of operation. Some are "employed as merchant vessels"; others "as exclusively public vessels." Public vessels are said to be "employed as merchant vessels" when they are employed to carry commercial cargo and passengers for hire. This is especially frequent in time of war or other national emergency. But in time of peace, when private shipping cannot profitably serve certain of our outlying possessions, public vessels are often used and they are then "employed as merchant vessels." Public vessels are said to be employed "as exclusively public vessels" when they are employed to carry only public cargoes and passengers. Common types of exclusively public employment are hospital ships, army transports and army harbor and sea-going tugs—so long as their use is confined to exclusively public purposes.

To decide when a public vessel is "employed as a merchant vessel" and when "employed exclusively as a public vessel" is frequently impossible. Exclusive public employment is not the rule. Army and navy transports both in war and peace frequently carry commercial cargo and passengers. See 10 U. S. Code 1367, 1368, 1371. The question

is one of degree. True, it is most often done to aid a contractor doing government work or a commercial air line maintaining island service bases. It is none the less a commercial operation and if enlarged to some extent, the transport ceases to be employed for exclusively public purposes. It must then be deemed to be "employed as a merchant vessel." So with the ten or a dozen United States Army Transports currently engaged on their return voyages in bringing refugees to this country for the International Refugee Organization. There seems little doubt that the courts would hold they are public vessels but "employed as merchant vessels."

Congress has passed two complementary jurisdictional statutes providing for admiralty suits against the United States. The Suits in Admiralty Act, 1920, 46 U. S. Code 741 *et seq.*, applies whenever the public vessel involved is "employed as a merchant vessel." The later statute, the Public Vessels Act, 1925, 46 U. S. Code 781 *et seq.*, which supplements and amends the earlier statute, was designed to fill the gap left by the 1920 statute's restriction of jurisdiction only to such cases where the public vessel was "employed as a merchant vessel." The 1925 Act grants jurisdiction for the bringing of any libel "for damages" arising out of government vessel operations and applies even when the public vessel involved was "employed exclusively as a public vessel." Together these complementary statutes provide the exclusive remedy against the United States in the admiralty and maritime field.

At this late date we do not believe any doubt as to the exclusive character of the admiralty jurisdiction statutes can exist. In *Matson Navigation Co.* v. *United States,* 1932 A. M. C. 202, 284 U. S. 352, 356, following *Johnson* v. *United States Fleet Corp.,* 1930 A. M. C. 1, 280 U. S. 320, 357, and *United States Fleet Corp.* v. *Rosenberg Bros.,* 1928 A. M. C. 441, the Supreme Court decided that the Suits in Admiralty Act was exclusive and prevented all Tucker Act jurisdiction not only in the district court but also in the Court of Claims. See also *Sanday & Co.* v. *United States,* 1933 A.M.C. 61, 76 Ct. Cls. 370.

As the Suits in Admiralty Act, standing alone, applies only in cases where the public vessels were "employed as merchant vessels," the Supreme Court left unanswered, the question whether the amendment effected by the Public Vessels Act made suit in admiralty the exclusive remedy where the public vessel involved was not "employed as a merchant vessel" but as an exclusively public vessel. But the court below and every other court which has ever considered the matter has recognized that the Supreme Court's reasoning inescapably applies to both of the complementary statutes. If it did not, the result would not only be that the statute of limitations for suits against the United States would differ according to the chance of how its public vessels were employed. The limitation period imposed by the Public Vessels and Suits in Admiralty Acts would become a mere *brutem fulmen.* The limitation would be subject to be changed from two years to six whenever the claimant might wish to have it so. He need only claim jurisdiction under the Tucker Act. See *Federal Sugar Refining Co.* v. *United States,* (2d Cir.) 1929 A. M. C. 84, 30 F. 2d 254, reversed, for failure to dismiss for want of jurisdiction, *sub nom. Johnson* v. *United States Fleet Corp., supra.*

Because of the practical difficulty in telling which of the two complementary admiralty suits statutes applies, it has long been the practice of prudent admiralty counsel to allege that the district court has jurisdiction "pursuant to the Public Vessels and Suits in Admiralty Acts, 46 U. S. Code 781 *et seq.,* 741 *et seq.*" or, even more often, "pursuant to the Suits in Admiralty Act and all acts amendatory thereof or supplemental thereto (46 U. S. Code 740-790)." And, if only one of the two acts is invoked, libelants are ordinarily allowed freely to amend to invoke the other. See e. g., *Jentry* v. *United States,* (S. D. Calif.) 1948 A. M. C. 58, 73 F. Supp. 899. In this way hundreds of suits, including many for seamen's wages, proceed to judgment each year without it ever being determined whether jurisdiction is founded particularly on the one or the other, or on both, of the two complementary admiralty jurisdiction statutes. Courts and government counsel alike have not until

appellants' present contention seen much reason for attempting to distinguish.

Relying upon the statute's literal language and the decisions of this Court in *United States* v. *Loyola,* (9th Cir.) 1947 A. M. C. 994, 161 F. 2d 126, 127, and *O. F. Nelson & Co.* v. *United States,* (9th Cir.) 1945 A. M. C. 1161, 149 F. 2d 692, 698, as well as of the Supreme Court and other courts of appeals in *Canadian Aviator, Inc.* v. *United States,* 1945 A. M. C. 265, 324 U. S. 215, 228; *American Stevedores* v. *Porello,* 1947 A. M. C. 349, 330 U. S. 446, 450, and *United States* v. *Caffey,* (2d Cir.) 1944 A. M. C. 439, 141 F. 2d 69, 70, cert. den. 319 U. S. 730, many civil-service seamen (not only of the Army Transport Service but of the numerous other government agencies employing public vessels of the United States exclusively as public vessels and not as merchant vessels) have brought and maintained their suits for wages under the Public Vessels and Suits in Admiralty Acts.

Civil-service seamen seeking recovery for services on public vessels which are employed as merchant vessels have never been denied the seaman's traditional remedy by suit in admiralty to recover for wages as well as for maintenance and cure. Jurisdiction of such suits is founded on the Suits in Admiralty Act with its two-year statute of limitations (46 U. S. Code 743). Civil-service seamen such as appellants here, serving on public vessels, such as hospital ships, army transports, coastal survey vessels and harbor and river patrol craft of all services, when employed exclusively as public vessels, have heretofore equally enjoyed the same remedy under the amendments effected by the Public Vessels Act and with the same two-year limitation (46 U. S. Code 782, 743).

Always heretofore it has been regarded as inequitable in the highest degree to reject the literal language of the Public Vessels Act and this Court's previous views. No attempt has been made to distinguish between the rights of civil-service seamen serving on public vessels according as their vessels were employed solely as public vessels or employed as "merchant vessels" by reason of carrying some

commercial cargo or passengers for hire. See *Jentry* v. *United States,* (S. D. Calif.) 1948 A. M. C. 58, 73 F. Supp. 899, 902. Seamen's rights, no more than the rights of shippers or injured shoreworkers, ought not to depend upon its intricacies. The distinction, we have seen, is most often one of quantity and degree and is largely accidental. Cf. *The Western Maid,* (1922) 257 U. S. 419; *James Shewan & Sons, Inc.* v. *United States,* (1924) 266 U. S. 108; *The Lake Lida,* (4th Cir., 1923) 290 Fed. 178; *O. F. Nelson & Co.* v. *United States, supra.*

B. *This Court should reject appellants' demand that the controlling cases be overruled and the question of limitations and jurisdiction be made henceforth to turn upon the type of service in which public vessels are employed*

Appellants' basic contention on this appeal is that this Court should overturn the previously established practice in admiralty suits against the United States. Appellants ask that all prior decisions be overruled and that this Court hold the questions of jurisdiction and statute of limitations applicable to suits for wages by civil-service seamen of the United States should henceforth depend upon whether the public vessels on which they have served happen to have been "employed as merchant vessels" or were employed exclusively in public functions.

If the public vessels ever chanced to be "employed as merchant vessels," such as is the case if they carry any commercial cargo or passengers, or if they were operated by the War Shipping Administration, so that the Clarification Act (50 U. S. Code Appx. 1291) applies, then, appellants apparently agree that their civil-service crew members must file suit in admiralty within the two-year statute of limitations applicable to admiralty suits against the United States. But if by chance the vessels are never "employed as merchant vessels," but exclusively as public vessels, then, say appellants, their civil-service crew members can disregard the two-year limitation and file suit at law within the

six-year statute of limitations applicable to Tucker Act suits against the United States.

We believe appellants' argument requires too much. Their own pleadings do not meet their need. If they are to be entitled to sue under the Tucker Act on their theory, they must allege and prove that their vessels were never at any time employed as merchant vessels, but always exclusively as public vessels. If their vessels ever during their service carried commercial cargo or passengers, the Suits in Admiralty Act is their exclusive remedy. It is elementary that the allegation and proof of jurisdiction is on the party suing the United States. Tucker Act pleadings must be dismissed unless they plainly negative jurisdiction under the admiralty suit statutes. *Matson Nav. Co.* v. *United States,* (1932) 284 U. S. 352, 359. Government officers may not concede the jurisdictional facts nor consent to the court's exercise of jurisdiction. Under appellants' theory the point becomes important and it is for them to establish. They failed to do so and their suit was correctly dismissed.

Appellants' contention for unequal treatment of civil-service seamen of public vessels according to the use the Government chances to make of their vessel is made solely in order to relieve appellants of their own laches. It is to permit appellants in this particular case, who neglected to file timely suit within the two-year statute of limitations provided by the Public Vessels and Suits in Admiralty Acts (46 U. S. Code 782, 743), to now bring this suit within the six-year limitation of the Tucker Act (28 U. S. Code 2401 (a), former 28 U. S. Code 41 (20)). For this purpose alone appellants seek to overturn the established practice and decisions.

The court below refused appellants' inequitable demand to disregard the prior decisions, which have held that civil-service seamen serving on public vessels can bring suits for wages only in admiralty and within two years as provided by the Public Vessels and Suits in Admiralty Acts. Instead the court below, correctly in our view, followed established decisions of this and other courts and the literal language of the statute. It held that the district court has

jurisdiction exclusively under the Public Vessels and Suits in Admiralty Acts and is given no jurisdiction of appellants' suit under the Tucker Act.

Never, we have seen, until appellants' contention in the present suit, has this exclusive jurisdiction of seamen's wage suits been questioned in any appellate court. Civil-service seamen of the United States, serving on public operated vessels, have the seamen's traditional right to sue their government employer for wages in admiralty and jurisdiction therefore is founded on the Public Vessels and Suits in Admiralty Acts. And this whether the vessels chance to be employed as "merchant vessels" in commercial carriage or employed as "exclusively public vessels" in military and lend-lease carriage.

The Public Vessels Act (46 U. S. Code 781) in pertinent part provides:

> A libel in personam in admiralty may be brought against the United States for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.

And it is elementary that a libel *for damages* is all inclusive, for "damages" is the compensation awarded for breach of any obligation, whether sounding in contract or tort.

The literal language of the statute as followed by this Court's decision in *United States* v. *Loyola,* 1947 A.M.C. 994, 161 F. 2d 126, by the decision of Judge Mathes in *Jentry* v. *United States,* (S.D. Calif.) 1948 A.M.C. 58, 73 F. Supp. 899, and that of Judge Goodman in the court below, *Thomason* v. *United States,* (N.D. Calif.) 85 F. Supp. 742, are fully dispositive of the question of the district court's jurisdiction in this present case. The statutory language confirms that claims "for damages" through breach of contract as well as tort are included, for it expressly provides (46 U. S. Code 782) that no interest shall be allowed prior to judgment except "upon a contract expressly stipulating for payment of interest."

It is familiar that a suit for money *damages* is the only remedy against itself to which the United States has ever

consented. Thus the Tucker Act authorizes suits "*for damages* in cases not sounding in tort" (28 U. S. Code 1346 (a-2)). Indeed, it has been long settled. "Damages consist in compensation for loss sustained * * * By the general system of our law, for every invasion of right there is a remedy, and that remedy is compensation. This compensation is furnished in the damages which are awarded." See *The Steel Trader,* 1928 A.M.C. 162, 275 U. S. 388, 391, quoting Sedgwick's *Damages.* The Public Vessels Act, just like the Tucker Act, permits the bringing of suits "for damages" for breach of contract. But unlike the Tucker Act it is not confined to "cases not sounding in tort." The Public Vessels Act, complementing the Suits in Admiralty Act, authorizes libels "for damages" in tort and contract alike. Thus the Supreme Court in *American Stevedores* v. *Porello,* 1947 A.M.C. 349, 330 U. S. 446, 450, fn. 6, called particular attention to the fact that the statute used the word *damages* "which means a compensation in money for loss or damage."

In *Canadian Aviator* v. *United States,* 1945 A.M.C. 265, 324 U. S. 215, 228, the court had previously expressly declared, "We hold that the Public Vessels Act was intended to impose on the United States the same liability * * * as was imposed by the admiralty law on the private shipowner." It thus covers suits "for damages" caused by breach of the vessel's contract to employ appellants. The fact that appellants' alleged damages were caused by the breach of their contracts of employment by persons acting for the public vessel, rather than by the vessel itself as a noxious instrument, involves nothing more than the traditional admiralty personification of the vessel. Indeed, the Supreme Court in the *Canadian Aviator* case declared that in using such language Congress had merely adopted "the customary legal terminology of the admiralty law," which refers to the vessel as causing every act which her personnel do in her behalf. "Such personification of the vessel," said the Court, "treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she

is legally responsible, has long been recognized by this Court." So in *Porello,* as we have seen, the Court likewise emphasized that in providing for suit "for damages" Congress undoubtedly had firmly in mind the distinction between "damage," meaning merely the actual loss or injury inflicted, and its plural "damages," meaning the compensation awarded in money for the loss or damage however caused to the libelant by the public vessel or those acting for her.

If there lingers in the Congressional language of the Public Vessels Act something of the flavor of tort, we need not be surprised. Nor is it controlling. Breach of contract has been held actionable under the Tort Claims Act as well as the Public Vessels Act. *United States* v. *Scrinopskie* (5th Cir., 1950), 179 F. 2d 959, 960. At the common law it is familiar that the action for breach of a simple contract was in *assumpsit,* a writ framed on the case after those sounding in tort for trespass or deceit. Ames, *History of Assumpsit,* 3 Select Essays on Anglo-American Legal History 259. In admiralty, the distinction between tort and contract was unknown until relatively late.

Considerations of practical convenience particularly demand equality of treatment of all litigants, including civil-service seamen serving on government vessels, whether the vessels are employed by the Government as "merchant vessels" or exclusively as public vessels. The rule of strict construction of statutes permitting suit against the sovereign should not be employed to create arbitrary distinctions, serving only to frustrate honest litigants, nor to make cases turn on the accidents of the Government's vessel operations. Courts should not be unmindful of the rule that, "The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures." *Great Northern Ins. Co.* v. *Read,* 322 U. S. 47, 53-54. But as the Supreme Court itself there noted, "When authority to sue is given that authority is liberally construed to accomplish its purpose." See also *United States* v. *Shaw,* 309 U. S.

495, 501; *New England Maritime Co.* v. *United States* (D. Mass.), 1932 A.M.C. 323, 55 F. 2d 674, 685, aff'd without opinion 73 F. 2d 1016; cf. *Canadian Aviator, Ltd.* v. *United States, supra,* 324 U. S. at 222. So Judge Cardozo, in *Anderson* v. *Hayes Const. Co.* (1926), 243 N. Y. 140, 147, 153 N.E. 28, 29, observed, "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

The established practice should continue to be followed. This Court should reaffirm its prior decisions, and uphold the action of the court below. We submit, that this Court should reject appellants' demand that it be assumed, contrary to the rule of the *Matson* case, *supra,* 284 U. S. at 359, that the public vessels on which they served were not employed as merchant vessels but as exclusively public vessels. Appellants should not be permitted to maintain suit under the Tucker Act after the expiration of the prescribed time to bring their suit under the Suits in Admiralty Act, as supplemented and amended by the Public Vessels Act.

II

The Decisions Establish That Appellants, as Regular Civil-Service Employees Appointed by the Secretary of War and Executing the Required Oaths of Office, Are Officers of the United States Prohibited from Maintaining District Court Tucker Act Suits for Compensation for Official Services

This Court in *Oswald* v. *United States,* (9th Cir. 1938) 96 F. 2d 10, as has every other court which has ever considered the question, held that all regular civil-service employees of the United States appointed by the head of their department and executing the required oath of office are "inferior officers" within the meaning of the Constitution and the meaning of the exception to district court jurisdiction found in the Tucker Act. To permit appellants, after the expiration of the two-year jurisdictional limitation of the Public Vessels and Suits in Admiralty Acts, to maintain this suit under the Tucker Act, appellants ask that these prior decisions be overruled.

The burden of establishing the facts and law to found any such additional jurisdiction was on appellants. We believe that appellants' laches bars them at the threshold, but that in any event the established course of decision, the history, and the plain language of the Tucker Act exception are all conclusive that their claims are excluded and their action was correctly dismissed by the court below.

A. *Appellants Alone Bear the Burden of Establishing Their Right to Proceed under the Tucker Act in Addition to the Admiralty Suit Acts and their Laches in Filing Suit Bars Their Suit.*

In considering appellants' claim to Tucker Act jurisdiction of a suit for compensation for official services, we start, as Judge Rifkind said in *Surowitz* v. *United States,* (S. D. N. Y., 1948) 80 F. Supp. 716, 718, "with the proposition it is the plaintiff's burden to establish the court's jurisdiction." And, as the Court of Claims in *Sanguinetti* v. *United States,* (1920) 55 Ct. Cls. 107, 133, affirmed 264 U. S. 146, declared:

> There are no presumptions to be indulged in favor of jurisdiction, it cannot be assumed if it does not in fact exist, it cannot be conferred by consent of parties, it must affirmatively appear, and it is a question for strict construction.

See also *United States* v. *Sherwood,* (1941) 312 U. S. 584, 590; *Eastern Transp. Co.* v. *United States,* 1927 A.M.C. 174, 272 U. S. 675, 686.

"The right of the plaintiff to recover is a purely statutory right" and jurisdiction, said the Supreme Court in *Price* v. *United States,* (1899) 174 U. S. 373, 375, "cannot be enlarged by implication." "It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed," the court continued, "we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume." (As was said in *United States* v. *Michel,* (1931) 282 U. S. 656, 659, another case where the claimants, like appellants here, had slept while their rights became time barred, "Suit may not be maintained against the

United States in any case not clearly within the terms of the statute by which it consents to be sued."

Appellants thus must first sustain the burden, which we emphasized in Point I, (*supra*, pp. 11-15), of persuading this Court that they cannot maintain their claims under the two complementary admiralty suit acts. Next, appellants must bear the burden of persuading this Court that, although appointed by the Secretary of War and executing the required oath of office, they are not inferior officers of the United States and are not forbidden to sue under the Tucker Act. But at the very outset, we submit, appellants must first satisfy this Court of their standing even to raise the issue of any alleged right to avail themselves of such additional Tucker Act jurisdiction. We believe under established Tucker Act decisions they are barred by their laches from invoking that jurisdiction.

Appellants' laches in waiting three years to file suit bars them at the threshold from coming into court by the Tucker Act. The Tucker Act has a six-year jurisdictional limitation statute. Decisions of the Supreme Court and the Court of Claims, however, bar any resort to the courts unless proper protest is promptly made and suit brought forthwith. *Norris* v. *United States,* (1921) 257 U. S. 77, 80, following *Nicholas* v. *United States,* (1921) 257 U. S. 71, 75, held fatal a delay of even eleven months in filing suit for compensation. In *Swisher* v. *United States,* (1922) 57 Ct. Cls. 123, 138, recovery was rejected for even six months delay in bringing suit for overtime. Immediate protest to the authority paying the compensation followed by prompt suit is indispensible. *United States* v. *Garlinger*, (1898) 169 U. S. 316, 322; *United States* v. *Martin,* (1876) 94 U. S. 400, 404.

If appellants had filed suit well within the two-year jurisdictional limitation period of the Public Vessels and Suits in Admiralty Act, they could not have maintained an action. They would be barred from the courts by laches unless they had protested to the authority responsible for denying them payment and then sued at once. The decided cases require government wage claimants, such as appel-

lants to make immediate protest to the authority which prescribed the regulations prohibiting payment of additional bonus and overtime. Prompt suit must follow immediate protest. This appellants failed to do. Appellants not only waited three years and did not sue promptly, but they made no protest. All the record shows was a report of overtime to the masters of their vessels (R. II:37-40). Yet they knew full well that the master was bound by the regulations and a protest to him was of no effect. They knew likewise that he was not the man that paid them. The *Garlinger* and *Swisher* cases clearly bar appellants.

We therefore believe that appellants have no standing even to undertake the heavy burden of establishing that they can maintain this suit under the Tucker Act in place of the government seaman's traditional remedy under the Public Vessels and Suits in Admiralty Acts.

B. *The Settled Course of Tucker Act Decisions Establishes that Every Regular Civil-Service Employee Appointed by Authority of the Head of His Department and Executing the Required Oath of Office is an Officer of the United States.*

In *Oswald* v. *United States,* (9th Cir., 1938) 96 F. 2d 10, this Court expressly held that civil service employees, such as appellants, are "inferior officers" of the United States who are excluded from maintaining Tucker Act suits for official compensation in the district court but must sue in the Court of Claims. The first question for decision, this Court said is (96 F. 2d at 13).

> Was the plaintiff an officer of the United States? "The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Const. art. 2, § 2, cl. 2. * * * "If an official has been appointed in any of the modes indicated in the

> paragraph of the federal Constitution above quoted, he is an officer of the United States." Scully v. United States, C. C. Nev., 193 F. 185, 187. See, also, Burnap v. U. S., 252 U. S. 512, 516, 40 S. Ct. 374, 376, 64 L. Ed. 692; United States v. Mouat, 124 U. S. 303, 307, 8 S. Ct. 505, 31 L. Ed. 463; United States v. Germaine, 99 U. S. 508, 25 L. Ed. 482; United States v. Hartwell, 73 U. S. 385, 393, 6 Wall. 385, 393, 18 L. Ed. 830; United States v. McCrory, 5 Cir., 91 F. 295, 296. We conclude, therefore, that the appellant was, or is, an "officer" of the United States.

Equally dispositive of appellants' attempt is the holding of the Fifth Circuit in *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295, the first appellate case to arise under the exception.

The exception was enacted by Congress pursuant to the recommendation of the Attorney General. Its purpose was to exclude from the district court jurisdiction the flood of overtime suits by letter carriers and navy yard mechanics (*infra,* pp. 32-34). Not unnaturally, the first case involved a letter carrier, McCrory, who, like appellants here, contended that his employment was not sufficiently important to make him an officer. The Fifth Circuit held appointment by authority of plaintiff's department head and the taking of an oath of office were controlling, not the importance of the position. The court said (91 Fed. at 296):

> It is argued that letter carriers are not officers of the United States, within the meaning of the statute in question, but are mere employes, not intended to be included in the statute. Letter carriers are appointed by the postmaster general under authority of the acts of congress, practically during good behavior. They are sworn and give bond for the faithful performance of their duties. They are paid from moneys appropriated for the purpose by congress, and their salaries are fixed by law. They have regularly prescribed services to perform, and their duties are continuing and permanent, not occasional or temporary. In U. S. v. Hartwell, 6 Wall. 385, 393, the supreme court declared that "an 'office' is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and

> duties." In U. S. v. Germaine, 99 U. S. 508; Hall v. Wisconsin, 103 U. S. 5, 8; U. S. v. Perkins, 116 U. S. 483, 6 Sup. Ct. 449; U. S. v. Mouat, 124 U. S. 303, 8 Sup. Ct. 505; U. S. v. Smith, 124 U. S. 525, 8 Sup. Ct. 595; and in Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. 103,—U. S. v. Hartwell, supra, is cited with approval. An examination of these cases, all bearing on the question in hand, will show that, in the opinion of the supreme court, where a person is appointed under authority of law by the head of a department, and his duties are continuing and permanent, and his emolument fixed, such person is an officer of the United States; and that, within the constitutional meaning of the term. Letter carriers, therefore, are officers, within the meaning of the above-quoted statute, restricting the jurisdiction of the circuit and district courts in regard to suits brought against the United States under the act of 1887.

Accord: *Kennedy* v. *United States,* (5th Cir., 1944) 146 F. 2d 26, 29 (Army mathematics instructor).

Other Courts of Appeals have followed this contemporaneous construction of the exception under the Tucker Act for the same reasons. *Callahan* v. *United States,* (D. C. Cir., 1941) 122 F. 2d 216, 218 (customs employee); *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295, 296 (letter carrier); *Borak* v. *Biddle,* (D. C. Cir., 1944) 141 F. 2d 278, 281 (Justice Department attorney). Cf. *McGrath* v. *United States,* (2d Cir., 1921) 275 Fed. 294, 300-301;

Appellants' brief seems to imply that Army Transport seamen lack that amount of dignity, importance and compensation which they think necessary to make them "inferior officers" of the United States (Br. 11). But the decisions have established that in a democracy, official status does not depend on such factors. As the court observed in *Brown* v. *United States,* (E. D. Ark., 1949) *infra,* Appendix F, pp. 84, 85, 87:

> Neither the importance of the task, the amount of compensation, nor the duties to be performed is determinative of whether the employee of the government is an "officer" within this exception in the Tucker Act. Surowitz v. United States, 80 Fed. Supp.

718, note 2. In Burnap v. United States, 252 U. S. 512, 516, the Supreme Court said: "The distinction between officer and employee in this connection does not rest upon differences in the qualifications necessary to fill the positions or in the character of the services to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. (Citing cases)"

* * * * *

The claims of the plaintiffs are of the character of claims dealt with by the Tucker Act of March 3, 1887, 28 U. S. C. 1346 (2), and would be maintainable in the district courts, if Congress had not seen fit to expressly withhold consent to sue the government on such claims. This exception, if applicable, is applicable to every grade of employee, and as the court must hold these plaintiffs to be officers of the United States within the exception, the exception will apply to them. United States v. Hartwell, supra; Kennedy v. United States, supra.

It should not be forgotten that the purpose of the Tucker Act exception was to put an end to district court suits for overtime by letter carriers and navy yard mechanics (*infra,* pp. 32-34). The employees in the *Brown* case were of far less importance than appellants and that case should be conclusive. Certain it is that the positions of most of the inferior officers of the United States to whom courts have denied the right to sue under the Tucker Act are of far less dignity and importance than those of appellants. See *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295, 296 (letter carrier); *Foshay* v. *United States,* (S. D. N. Y., 1931) 54 F. 2d 668, 669 (postal clerk); *Oswald* v. *United States,* (9th Cir., 1938) 96 F. 2d 10 (court reporter); *Callahan* v. *United States,* (D. C. Cir., 1941) 122 F. 2d 216, 218 (customs employee); *Borak* v. *Biddle,* (D. C. Cir., 1944) 141 F. 2d 278, 281 (Justice Department attorney); *Kennedy* v. *United States,* (5th Cir., 1944) 146 F. 2d 26, 27 (Army mathematics instructor); *Baskins* v. *United States,* (E. D. S. C., 1940) 32 F. Supp. 518, 519 (penal guard); *Hen-*

derson v. *United States,* (S. D. N. Y., 1947) 74 F. Supp. 343, *Jentry* v. *United States,* (S. D. Calif., 1947) 73 F. Supp. 899, 901 and *Thomason* v. *United States,* (N. D. Calif., 1949) 85 F. Supp. 742 (Army Transport seamen); *Surowitz* v. *United States,* (S. D. N. Y., 1948) 80 F. Supp. 716 (Army attorney); *Brown* v. *United States,* (E. D. Ark., 1949) Appendix F, *infra,* p. 84 (Army Air Force employees); *Bolin* v. *United States,* (W. D. N. Y., 1949) Appendix F, *infra,* p. 88, and *Winsberg* v. *United States,* (S. D. Calif., 1949) Appendix F, *infra,* p. 96 (Veterans Administration physicians); *Owens* v. *United States,* (M. D. Ala., 1945) Appendix F, *infra,* p. 95 (Army fire-fighters).

In view of the purpose of the Tucker Act exception to deal particularly with overtime claims of letter carriers and navy yard mechanics it is natural that only six cases have ever reached a contrary result in the entire fifty-two years of litigation. All turn on their special facts and all but one are reported. *Scully* v. *United States,* (C. C. Nev., 1910) 193 Fed. 185 (deputy appointed by surveyor); *United States* v. *Swift,* (1st Cir., 1905) 139 Fed. 225 (bailiff appointed by marshal); *Cain* v. *United States,* (N. D. Ill., 1947) 73 F. Supp. 1019, further proceedings 77 F. Supp. 505 (secretary appointed by individual judge); *Ducey* v. *United States,* (D. Minn., 1945) unreported (physician appointed by Veterans Administrator); *Morrison* v. *United States,* (S. D. N. Y., 1930) 40 F. 2d 286, and *Brooks* v. *United States,* (E. D. N. Y., 1939) 33 F. Supp. 68 (naval petty officers not appointed but "rated" from enlisted ranks by their immediate commanders).[1] We believe the grounds of decision of these contrary cases only

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[1] The case of *Walsh* v. *United States,* (E.D. Pa., 1947) 72 F. Supp. 441, involving Army firefighters, was only on a preliminary motion and is not pertinent. It turned solely on the state of the record at the time of the motion. The Government had made certain concessions and there was nothing before the court to show the method of plaintiff's appointment. On a fuller record a contrary result was reached as to the same category of employees in *Owens* v. *United States,* (M.D. Ala., 1945) *infra,* Appendix F, p. 95. It is perhaps significant that the *Walsh* case has never been brought to trial.

serve to confirm that appellants cannot sue under the Tucker Act.

In *Scully* the court emphasized that appointment by authority of a department head is necessary to constitute an employee an officer; Scully was a contract surveyor employed by one of the local surveyors general of the General Land Office (193 Fed. 186, 188). In *Swift* the court pointed out that "bailiffs are never sworn in accordance with the statute, and are not 'officers of the United States' " but only of the court (139 Fed. at 227).[2] In *Cain* the secretary was employed by the particular judge, not appointed by the court, nor by the Director of the Administrative Office of United States Courts. (See 28 U. S. Code 712 and 752 and revisors' notes as to prior statutes.) Appointment by the court or the department head is necessary for an "officer." The decision emphasized (73 F. Supp. at 1019) her employment was the act of only the particular judge who selected her.

It should be remembered that there are quite a few such irregular government "employees." Not only are they not inferior officers of the United States, as are regular civil-service employees, such as appellants here; it may be doubted that they are employees of the United States at all, even though they may ultimately be paid from government funds. Cf. *Dismuke* v. *United States,* (1936) 297 U. S. 167, 173.[3]

Ducey's case turned on the contention that the head of the Veterans Administration was not the head of a department. Because it involved only $60 and was not re-

[2] Cf. *Collins* v. *Mayor,* (1875) 3 Hun. (N.Y.) 680, 681: "Probably the true test to distinguish officers from simple servants or employees, is in the obligation to take an oath."

[3] Such irregular employees, employed outside the regular civil service by individual government officers, either as their personal assistants or for intermittent service, although often of great dignity, have always been held not to be "inferior officers" of government but at most mere employees. *United States* v. *Germaine,* (1878) 99 U.S. 508, 511; *United States* v. *Smith,* (1888) 124 U.S. 525; *Auffmordt* v. *Hedden,* (1890) 137 U.S. 310, 326; *Burnap* v. *United States,* (1920) 252 U.S. 512.

ported, we took no appeal. The case is discussed and a contrary decision reached in *Bolin* v. *United States,* (W. D. N. Y., 1949) *infra,* Appendix F, pp. 88, 92. See also *United States* v. *Marcus,* (3d Cir., 1948) 166 F. 2d 497, 503. The cases of *Morrison* and *Brooks* we believe to have been wrongly decided. In the first case, Morrison was concededly entitled to recover, while the record on the jurisdictional point was clearly insufficiently made. In the *Brooks* case, where a better record was made, the decision was for the Government on the merits. In neither case was appeal practical.

In the face of the statutes, the regulations and the personnel file placed in evidence with the district court, appellants cannot deny that they were appointed by authority of the Secretary of War. Nor can they deny that they executed the required oath of office and the required affidavit that they had not made any payment to obtain appointment. These are requirements which apply by their terms to "officers" (5 U. S. Code 16 and 21a) and appellants' compliance is significant. Under the overwhelming weight of decision, such appointment and execution of an oath constituted appellants "officers." Appellants doubtless recognize the weakness of any reliance on the small contrary minority of cases involving special circumstances. At any rate, appellants' chief reliance is not on those cases but on an attempt to distinguish their present case on two grounds: (1) that, despite 5 U. S. Code 43 (*infra,* Appendix B, p. 50) and *United States* v. *Hartwell,* (1867) 6 Wall. 385, 393, only department heads, acting in their proper person, may appoint and they may not delegate their power of appointment, and (2) that the execution of the supplemental overseas employment contract, pursuant to 50 U. S. Code Appx. 763 (*infra,* Appendix B, p. 50), is incompatible with "officer" status.

Appellants appear to argue that because the Secretary of War did not personally sign their letters of appointment and personally administer their oaths of office they are not "inferior officers" of the United States (Br. 9, 12). This Court in the *Oswald* case and the Fifth Circuit in the *Kennedy* case *supra,* both held that *approval*

by the Assistant to the Attorney General was sufficient. Every decided case under the Tucker Act has upheld such appointments as sufficient although the department head has acted by approval or delegation as authorized by 5 U. S. Code 43 (*infra,* Appendix B, p. 50). *Brown* v. *United States,* (W. D. Ark., 1949) *infra,* Appendix F, pp. 84, 86; *Surowitz* v. *United States, supra,* 80 F. Supp. at 719; *United States* v. *Hartwell,* (1867) 6 Wall. 385, 393; *Kennedy* v. *United States, supra,* 146 F. 2d at 28; *M'Grath* v. *United States,* (2d Cir., 1921) 275 Fed. at 301; *Henderson* v. *United States,* (S. D. N. Y., 1947) 74 F. Supp. 343, 344. Indeed, it may be doubted that few if any of the "inferior officers" whose appointment is vested by Congress in the department heads and whose suits for official compensation have been litigated were ever appointed by the department head acting in his proper person. See *United States* v. *Marcus,* (3d Cir., 1948) 166 F. 2d 497, 503, semble that statutory authority in the department head to appoint will be taken to assume there was appointment or at least approval by him.

Appellants (Br. 10) also make much of the fact that in accordance with established procedure under 50 U. S. Code Appx. 763, (*infra,* Appendix B, p. 50), they were required to execute supplemental overseas employment contracts, binding themselves to serve overseas for at least one year. "A special contract with an officer," say appellants, "would be an anomaly." But appellants view is directly contrary to the famous dictum of Chief Justice Marshall that there might be a "contract to perform the duties of the office". *United States* v. *Maurice,* (C. C. Va., 1823) 26 Fed. Cas. No. 15, 747 at p. 1214. This exact question, moreover, was decided the other way by Judge Rifkind. He held that execution of overseas employment contracts did not affect the officer status of civil service employees. That decision was in connection with a similar contract involved in a suit by a shoreside employee of the Army in *Surowitz* v. *United States,* (S. D. N. Y., 1948) 80 F. Supp. 716, 719. Judge Rifkind said:

> * * * It would appear, therefore, that because in the instant case the plaintiff was appointed by the Secretary of War exercising his authority through a subordinate official to whom he had delegated his authority

> and because the appointment was made pursuant to a statute creating the position or office which the plaintiff filled, he is an officer.
>
> The question remaining is whether such a conclusion is inconsistent with the admitted allegation that the plaintiff was employed pursuant to a contract of employment. There is language in United States v. Hartwell, 1867, 6 Wall. 385, 393, 18 L. Ed. 830, which distinguishes appointments to office from contracts of employment; but, as I read that language, it does not mean that there is a necessary inconsistency between the two conceptions in every case. Neither of the parties has submitted a copy of the alleged contract. It is a fair inference, however, that by his contract the plaintiff agreed to hold his post for a period of one year, a provision which the government may have regarded as useful in the light of the fact that it was going to transport the plaintiff overseas and back at considerable expense. In any event, I see no logical reason for asserting that there is an inevitable incompatibility between appointment to an office and the exchange of promises relating to the terms and conditions under which the office is to be performed. See Hall v. Wisconsin, 1880, 103 U. S. 5, 10, 26 L. Ed. 302.
>
> My conclusion is that the plaintiff was an officer of the United States. The United States District Court is, therefore, without jurisdiction to hear his claim for salary or compensation.

Judge Bondy also reached that result in respect of the similar overseas contracts of Army Transport seamen. See *Henderson* v. *United States,* (S.D. N.Y., 1947) 74 F. Supp. 343, 344.

We believe therefore that, by the overwhelming weight of the decided cases, appellants as civil-service employees appointed by and with the approval of their department head and executing the required oath of office are inferior officers prohibited from suing under the Tucker Act. We submit this Court should summarily reject appellants' demand that the settled case law should be overruled in order to allow the tardy maintenance of their suit for seamen's wages.

C. *The Legislative History and Purpose of the Exception of Suits for Official Compensation from District Court Tucker Act Jurisdiction Confirms Its Application to All Regular Civil-service Employees such as Appellants.*

The established judicial construction of the Tucker Act exception as prohibiting suit by any regular civil-service employee, appointed by authority of the head of his department and executing the required oath of office, has been given Congressional sanction by the repeated reenactment of the clause without substantial change. Such reenactment has been repeatedly held to signify Congressional approval. *Lang* v. *Commissioner,* (1938) 304 U. S. 264, 270; *Helvering* v. *R. J. Reynolds Tobacco Co.,* (1939) 306 U. S. 110, 115; *Helvering* v. *Bliss,* (1934) 293 U. S. 144, 151. It confirms the purpose of the exception as originally enacted to correct the confusion and conflicts created by district court decisions as to the overtime compensation and fees of government employees.

For most purposes, every person in the federal civil service appointed by the President or by or on behalf of a department head is an "officer." *Hoeppel* v. *United States,* (D.C. Cir., 1936) 85 F. 2d 237, 240-242, cert. den. 299 U. S. 557; *Towle* v. *Ross,* (D. Ore., 1940) 32 F. Supp. 125, 127; 16 Ops. A. G. 113. Strict construction of criminal statutes has often led to a different result, because of contrast with criminal enactments expressly covering employees and agents. Such cases should be disregarded in construing the Tucker Act exception in the face of its history and the substantial judicial unanimity as to its liberal construction to forbid district court suits.

In this connection, it is appropriate to note that it is not unusual for the same words to be used with different meanings in different acts, and even in different parts of the same act. *Atlantic Cleaners & Dyers* v. *United States,* (1932) 286 U. S. 427, 433. Cf. *Boston Sand Co.* v. *United States,* 278 U. S. 41, 48; *United States* v. *Dickerson,* 310 U. S. 554, 561. This is especially true in legislation affecting government personnel. *Morgenthau* v. *Barrett,* (D.C. Cir., 1939) 108 F.

2d 481, 483. Thus, the Supreme Court held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat,* (1888) 124 U. S. 303), but, in a decision handed down the same day, equally held that such a clerk was an "officer" for the different purposes of a different statute (*United States* v. *Hendee,* (1888) 124 U. S. 309). Such results, far from being inconsistent, simply effectuate the different legislative intent underlying each use of "officer" in the statutes. *Steele* v. *United States No. 2,* (1925) 267 U. S. 505.

The exception of suits for official compensation was an amendment added to the Tucker Act in 1898 because of the difficulties created by district court jurisdiction over claims of government employees for overtime compensation and fees. As originally enacted, Section 2 of the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, contained no exception of suits for official compensation. Prior to the amendment effected by the Act of June 27, 1898, c. 503, 30 Stat. 495, such suits by government workers for compensation could be freely maintained. *United States* v. *McCrory,* (5th Cir., 1899) 91 Fed. 295. Overtime pay suits, filed by letter carriers and navy yard mechanics as a result of the Act of May 24, 1888, c. 308, 25 Stat. 157, and the Act of August 1, 1892, c. 352, 27 Stat. 340, soon became a problem. The Reports of the Attorney General clearly disclose the situation. The fiscal year 1894 saw 37 district court letter carrier overtime cases disposed of, but 1,025 individual judgments had to be entered in the 37 cases (Ann. Rep. A. G., 1894, p. 10). In fiscal 1895, of the total of 48 new suits filed in the district courts under the Tucker Act, 15 were suits for mechanics' overtime, the number of individuals suing not being specified (*Ibid.,* 1895, p. 41). In fiscal 1897, of 47 new suits 19 were for letter carriers' overtime, the number of individuals suing again left unspecified (*Ibid.,* 1897, p. 5).

Repeated recommendations were made for concentrating such litigation as to Government employees compensation in the Court of Claims (E.g. *ibid.,* 1894, p. 10, 1897, p. 7). Thus in 1895 the Attorney General reported: "I recommend that claims of United States officers or employees for compensation, expenses, or fees be excluded from the jurisdiction of the circuit and district courts"

(*Ibid.*, 1895, p. 15). As a result of Congressional enactment of the recommended legislation in 1898, however, it was reported in 1900 that the total of all new Tucker Act suits outside the Court of Claims had been reduced to 18; the reduction being attributed to the exclusion of suits for compensation by government employees (*Ibid.*, 1900, p. 54).

The original 1898 amendment introduced this exception of government employees' wage suits from district court jurisdiction by adding the following language:

> The jurisdiction hereby conferred upon the said circuit and district courts shall not extend to *cases brought to recover fees, salary, or compensation for official services of officers of the United States,* or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. (Emphasis added)

When the Judicial Code was amended and codified by the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093, no change was made. Paragraph 20 of Section 24 (former 28 U. S. Code 41 (20)) reenacted the exception in the following substantially identical terms:

> Provided, however, that nothing in this paragraph shall be construed as giving to the district courts jurisdiction of *cases brought to recover fees, salary, or compensation for official services of officers of the United States* or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. (Emphasis added)

Finally, in its present form the new 1948 Judicial Code enacted by the Act of June 25, 1948, c. 646, 62 Stat. 869, 933, restated the exception in 28 U. S. Code 1346 (d-2) as follows:

> (d) The district courts shall not have jurisdiction under this section of :
> (2) Any *civil action to recover fees, salary, or compensation for official services of officers of the United States.* (Emphasis added)

Congress has thus adhered throughout to the same language without substantial change. It must therefore be taken to have approved the settled judicial construction of "officers" as including all regular civil-service employees.

The function of the courts in interpreting statutes is to

construe the language so as to give effect to the intent of Congress. *United States* v. *American Trucking Ass'ns.*, (1940) 310 U. S. 534, 542-544. The controling Congressional purpose in originally prohibiting district court jurisdiction of suits for official compensation is plainly stated in H. Rept. No. 325, 55th Congress, 2d Session, February 1, 1898. The pertinent portions of that report declare:

> The reasons for the change rest in part upon—
>
> First. That the circuit and district courts are widely separated geographically, and often while one of them may be deciding a question in one way another may be deciding it another way; and there is now a large number of conflicting judgments on the same questions.
>
> Second. Cases are brought against the United States at places remote from the capital, of which the proper Department is not advised, and proper defenses are impracticable and are often not made. For example—
>
> The Act of July 31, 1894, provides that no person holding an office worth $2,500 per annum shall hold another compensated office.
>
> A held the office of clerk of the circuit court of appeals, of which the compensation exceeded $2,500. He also held the office of clerk of circuit court of the United States, with large compensation. The Treasury refused to pay him for the second office. He thereupon brought suits quarterly in the district court of the United States for less than $1,000, and for a while recovered.
>
> Many other abuses might be cited of a similar general character.

The report thus clearly evidences the Congressional intention that suits for salary, overtime, fees and every other type of official compensation were thereafter to be limited to the Court of Claims—the one court at the seat of the Government in which all departmental records are immediately available and where the defense of the suits can be conducted by attorneys specializing and skilled in the laws and regulations involved.

To construe the word "officer" in any narrow sense, excluding regular civil-service employees, such as appellants, would defeat the express purpose set out in the Committee report except in the cases of a few high officers.

It is plain that the intention of Congress in using the word "officer" in the Tucker Act exception was to employ it in the broad, popular sense, the same as in the Act of July 31, 1894 (28 Stat. 205, 5 U. S. Code 62), referred to by the Committee. That statute, prohibiting dual compensation, like 5 U. S. Code 71, prohibiting additional compensation, would be worthless if restricted. It would be fantastic to hold that the chief officers of the Government were prohibited from double employment where the total salary exceeded $2500 but that subordinate employees might be so employed. Such statutes have always been applied to civil servants of all grades alike. As indicated by the Committee report, the Tucker Act exception should be construed in the same fashion.

The controling considerations for enactment of the exception in 1898 still apply. The evils of conflicting decisions in the numerous district and circuit courts and of the difficulty of providing for the defense at widely divergent points by the small attorney staff available to the Government, which the Committee emphasized in 1898, have increased in importance many fold since 1898. The number of courts and judges has doubled. The technicalities of overtime and bonus payable to many types of civil-service employees, particularly those in the common grades, have grown far beyond those created by the Acts of 1888 and 1892.

The courts have always recognized that in such cases evidence of the facts cannot be furnished by the plaintiffs, but calls must be made on the department involved and the General Accounting Office. The fact that the right to overtime compensation and fees is still governed by a mass of unpublished regulations changing from day to day and difficult of comprehension makes it ever more difficult to prepare such cases without close consultation between the Government's attorneys and its accounting officers. Only at the seat of the Government are found the records and the witnesses who can testify as to the facts in most pay cases. The established rule restricting such suits to the Court of Claims accomplishes this purpose. Yet it works no undue hardship upon a liti-

gant since the Court of Claims follows the practice upon request of the plaintiff of holding hearings for the taking of evidence at his place of residence or at locations serving his convenience and that of his witnesses.

Finally, if we may advert to the merits of the claims of appellants in this particular case, it must be conceded that they represent a relatively simple problem (see *infra,* Point III, pp. 38-47). Indeed, seamen's compensation is not ordinarily difficult even when they serve the United States. And it is for that reason that they have always heretofore been thought to enjoy the traditional admiralty remedy in the district court, although shoreside employees of similar grade must resort to the Court of Claims. But the effect of the change advocated by appellants for this case will reach equally to other civil-service employees who present a different situation. If, in order to permit appellants to maintain this tardy suit, the established rules are set aside, the entire present structure of wage suits will be destroyed and every civil-service employee will be entitled to sue in the district court.

For the foregoing reasons we believe that there should be no departure from the established pattern of judicial decision as to the meaning of the Tucker Act exception of suits for official compensation. This Court should confirm its prior decision in the *Oswald* case and affirm the decision below.

III

The Plain Language of Appellants' Contract Required Dismissal of Their Complaint on the Merits, Even If It Had Been Timely Brought in Admiralty; the Applicable Regulations Only Serve to Re-enforce the Contract Language

Appellants pleaded as an exhibit to their complaint the supplemental contract for overseas service, some form of which all civil-service employees going abroad are required to execute as an assurance to the United States that they will remain overseas for at least a year. The court below, following Judge Bondy in *Henderson* v. *United States,* (S. D. N. Y.) 1947 A. M. C. 1371, 74 F. Supp. 343, 345, held

that appellants here "are not entitled, under the contract terms, to recover what they seek" (R. I 34; 85 F. Supp. at 744). See accord unreported decision of January 31, 1949, by Judge Mathes in *Jentry* v. *United States, infra,* Appendix E, p. 81.

We believe that this conclusion of the district court follows from the unambiguous terms of appellants' supplemental contract for overseas service. However, because appellants suggest that the contract is ambiguous, we have printed in Appendix C and D, *infra,* pp. 62-80, the applicable regulations and administrative decisions which under established law this Court should judicially notice if it finds ambiguity in the contract.[4] These regulations and decisions remove any possibility of ambiguity and show that appellants' suit was correctly dismissed on the merits as well as for want of jurisdiction.

Appellants' claim, as finally submitted to the district court (see *supra,* p. 3) was confined to only three parts: (a) area bonus, (b) overtime pay and (c) sick leave allowance. We will discuss each of these three items hereafter in that order.

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[4] Army regulations, including circulars, directives, memoranda and other official orders, whether of the Department or of subordinate units, are noticed judicially. All acts done in the performance of official duty are matters which may take judicial notice. *Caha* v. *United States,* (1894) 152 U.S. 211, 221-222; *Southern Pacific RR. Co.* v. *Groeck,* (C.C. Calif., 1895) 68 Fed. 609, 612. Even unwritten administrative practices will be noticed. *United States* v. *Birdsall,* (1914) 233 U.S. 223, 230. Introduction into evidence is not necessary. *Labor Board* v. *Atkins & Co.,* (1947) 331 U.S. 398, 406, note 2; *Caha* v. *United States, supra.* Such regulations, even though not formally published in the Federal Register, have the force of law. *Standard Oil Co.* v. *Johnson,* (1942) 316 U.S. 481, 484; *Billings* v. *Truesdell,* (1944) 321 U.S. 542, 551; *United States* v. *Grimaud,* (1911) 220 U.S. 506, 517, 520. The court will itself procure copies of regulations if necessary (*Leonard* v. *Lennox,* (8th Cir., 1910) 181 Fed. 760, 764), although it is preferable practice to put the regulations in the record (*Nagle* v. *United States,* (2d Cir., 1906) 145 Fed. 302, 306). Even on appeal the court may, where necessary, take judicial notice of matters not brought to the attention of the trial court. *American Legion Post No. 90* v. *First National Bank & Trust Co.,* (2d Cir., 1940) 113 F. 2d 868, 872.

A. *Appellants' overseas-service contract makes it plain that the overseas bonus of a flat 100 percent wage increase, in addition to base wages, was to be in lieu of all area and attack bonuses*

The language of appellants' overseas contract makes express provision that 100 percent bonus is paid in lieu of all other bonus, whether for area or attack. Paragraph 1 of appellants' overseas service contract provides, with emphasis supplied (R. I 9), that in addition to his base wages—

> * * * The employee shall be paid such additional increases in wages *as may be prescribed by competent War Department authority* for and on account of the war risk bonuses which are predicated upon transit of areas of risk and the prevailing wage practice of the maritime industry which the War Department is committed to follow as nearly as is practicable under its policy of conforming with the prevailing maritime practice. *It is hereby agreed and understood that in accord with the prevailing maritime wage practices as presently approved and adopted by the War Department* for the area to which the employee is assigned, the employee will be paid in addition to the base wages stipulated above a flat increase in wages of *One Hundred* per cent (*100%*) to be paid upon arrival of the employee at the *European* Theater of Operations, the assigned post of duty or upon reassignment of the employee to the vessel to be delivered to the assigned post of duty.

Paragraph 15 of the contract, confirming that the 100 percent bonus is in lieu of all other bonus, further provides (R. I 16):

> 15. The provisions herein contained *shall be deemed to include and be the equivalent* of the prevailing employment conditions in the maritime industry.

There can thus be no question that, as held by the court below and by the other district courts in the *Henderson* and *Jentry* cases, the appellants "are not entitled, under the contract terms, to recover what they seek."

Appellants, in seeking recovery of additional payments

of bonus not expressly provided for by the contract (see Br. 15-16), are apparently attempting to establish their claims by the contention that other seamen (working under entirely different contracts at entirely different rates of base pay and employed under foreign shipping articles on War Shipping Administration or large transport class vessels of the Army Transportation Corps) received such additional bonuses under such different contracts.[5] The short answer to that contention is that appellants' contracts made no such provision, as did those of W. S. A. seamen and of the articled seamen on large transport type vessels of the Army.

Analysis of Paragraph 1 of appellants' contract (R. I 9) makes plain their special contractual status. The contract begins as follows:

1. The Employee, on his representation that he is

---

[5] Appellants assert their claim on the basis of Decision 2B of the Maritime War Emergency Board (R. I 2-3). They entirely disregard, however MWEB Decision 4A describing the period of time during which Decision 2A and its succeeding revisions 2B, 2C, and 2D apply to tugboat seamen, such as appellants, who are employed on WSA tugs. The dominant distinction between appellants' bonus rights and those of WSA tugboat seamen was that appellants received 100 percent overseas bonus even when their vessels were in drydock or in a safe harbor in England (R. II:46-51). Under Decision 4A of the Maritime War Emergency Board (8 F. R. 3462; 46 Code of Fed. Regs., 1943 Supp., p. 2140) WSA tugboat seamen, by contrast, were only paid area bonus "effective at the midnight or noon next preceding the hour on which the vessel proceeds on its employment, and shall terminate on the noon or midnight next succeeding the hour when the vessel is moored upon the completion of its assignment."

In most cases, therefore, ATS seamen, such as appellants, actually collected far more money than WSA tugboat seamen to whom NWEB Decision 4A made applicable Decisions 2A, 2B, 2C and 2D (46 C.F.R., 1943 Supp. p. 2136; *ibid.*, 1944 Supp. p. 3775; *ibid.*, 1945 Supp. p. 4328). Payment of a continuous overseas bonus relieved the Army, however, of a very large accounting burden. It was thought better to pay the added money to the seamen rather than to lay it out in paper work costs.

The purpose and activities of the Board are fully set forth in the Code of Federal Regulations. The Board was appointed by the President to decide issues between the seamen's unions and signatory ship operators. 46 C.F.R., 1943 Supp. p. 2124. See the Board's own statement, 1944 A.M.C. 1020.

> an experienced and qualified A. B. seaman (designation of position) is hereby employed and agrees to serve on a vessel owned, operated, chartered, employed or controlled by the War Department at any post of duty in the world to be determined by the Government to which he may be assigned, for a period of One Year (duration of contract) from the effective date of arrival at the European T. O. (theatre of operation) unless sooner relieved at the pleasure of the Government, from the effective date of this contract * * *.

Considered thus far, the contract employs appellants for service on a vessel of the War Department at any post of duty in the specified area—European Theater in the present cases. Paragraph 1 then continues as follows:

> the Employee agrees to serve at the minimum rate of *$1,200.00* Dollars per annum which shall be considered the base wages of the Employee * * *

The parties thus agree upon a minimum rate of *base wages,* and it is not understood that appellants deny that they have received such base wages. Paragraph 1 then continues, with emphasis supplied, as follows:

> * * * and in addition thereto the Employee shall be paid such additional increases in wages *as may be prescribed by competent War Department authority* * * *

Up to this point the contract provides expressly for payment of (1) a base wage and in addition thereto, (2) such unspecified additional increases, if any, *as may be prescribed by competent War Department authority*—always provided that competent authority decides to prescribe any at all. Then follows the contract language immediately after the words "competent War Department authority" which state for and on account of what things "competent War Department authority" *may* prescribe if it decides to do so, for additional payment. That part of Paragraph 1 describing the limits within which "competent authority" may act, if at all, read as follows:

> * * * for and on account of the war risk bonuses

> which are predicated upon transit of areas of risk and the prevailing wage practice of the maritime industry which the War Department is committed to follow as nearly as is practicable under its policy of conforming with the prevailing maritime practice. * * *

And it is from this just quoted clause of the paragraph that appellants seek to single out and divorce from its context the phrase "the prevailing wage practice of the maritime industry" to support their argument.

Appellants' contention wholly ignores the context of the contract and in doing so ignores the only words of promise in the paragraph, words that unequivocally declare that the sole additional increases that may be paid in any event are such additional increases in wages only as *may be prescribed* by competent War Department authority, and not unless and until so prescribed. The part of Paragraph 1 just quoted, and on which appellants rely, clearly states the things for and on account of which the competent War Department authority may prescribe additional compensation. But it does not say that competent authority will do so.

The remainder of Paragraph 1 then provides what at the time of contracting was to be deemed as the equivalent of "prevailing maritime practice." It reads as follows (R. I 10):

> It is hereby agreed and understood that in accord with the prevailing maritime wage practices *as presently approved and adopted by the War Department* for the area to which the employee is assigned, the employee will be paid in addition to the base wages stipulated above, a flat increase in wages of *One Hundred* per cent (*100%*) to be paid upon arrival of the employee at the European T. O., the assigned post of duty or upon reassignment of the employee to the vessel to be delivered to the assigned post of duty.

The final sentence of Paragraph 1 thus provides for the assignment of the particular appellant to a particular post of duty—the European Theater of Operations. Speaking as of the time of the signing of the contract at the Army Base in Brooklyn, New York, it declares that the particular

appellant and the Government have agreed that in accord with the prevailing wage practices *as approved and adopted by the War Department* (i.e., competent War Department authority) for the particular European Theater of Operations, appellant will be paid a flat increase in wages of 100 percent upon his arrival at the European Theater of Operations, or that the appellant, if assigned to a vessel to be delivered to the European Theater, will likewise be paid such a flat increase in wages of 100 percent.

It is clear from the unambiguous terms of the contract read in their context that the 100 percent increase in wages is to be full satisfaction until any later change of the promise that the appellants will be paid such additional increase in wages as may be prescribed by competent War Department authority. The regulations which this Court should judicially notice, Appendix C, *infra,* pp. 62-71, confirm that nothing beyond the contract rate of base wages plus 100 percent was ever prescribed as bonus.

The general *Marine Personnel Regulations* of the Transportation Corps, which governed appellants, prescribed in Section 5 of Regulation 11 (copies of which in both the original version of July 1, 1944, and the revision of July 15, 1945, *infra,* Appendix C, pp. 65-68) the detailed application of the bonus provision of appellants' contract. The pertinent language follows:

> 115.1 Overseas bonus is payable in lieu of all other war risk bonuses to crew members engaged under contract for overseas employment on vessels permanently assigned to a post of duty in such overseas commands.
>
> * * * * * * *
>
> 115.3 The amount of percentage increase in compensation in lieu of all other bonuses of any other character will be in accord with the percentage stipulated in the contract. * * *

Effective July 1, 1945, shortly before appellants' discharge in July and early August, this was changed to read:

> 115.3 The amount of percentage increase in compensation will be set by the Chief of Transportation * * * Such percentage increase in compensation, in lieu of all other war risk bonuses, will be subject to adjustment from time to time to conform with changes in war hazards as reflected in Decisions of the Maritime War Emergency Board as approved by the War Department.[6]

And that construction is further confirmed by local regulations of the Office of the Chief of Transportation, E. T. O. U. S. A. (European Theater of Operations, U. S. Army), Appendix C, *infra,* pp. 69-71, in Circular No. 16, dated February 19, 1945, providing in Paragraph 1.d.(3) that:

> Inasmuch as extra work by War Department civilian employees, T. C. [Transportation Corps], was taken into consideration in establishing wage scales, overtime compensation will not be paid. *100% Bonus is paid in lieu of all other bonuses.*

There can thus be no question or ambiguity as to the complete absence of any right in appellants to added bonus and, indeed, the *Henderson* and *Jentry* cases, *supra,* like the court below, have so held.

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[6] The provisions of the contract and regulations regarding war bonus were arrived at as a result of the decision of the Maritime War Emergency Board embodied in the letter of its secretary, Erich Nielsen, dated December 8, 1943. Copies of the decisional letter and of all related correspondence are included in Appendix D, *infra,* pp. 72-80. It is there stated that: "Decisions 2 A and 4 A of the Board apply to small vessels operated by signatories of the Statement of Principles except where such operations are conducted wholly or principally within inland waters. The Board recognizes, however, that there are no comparable commercial operations in the European Theater of Operations on the type of vessel and the type of mission to which you advise the War Department vessels and crews are to be assigned. The Board also recognizes that the War Department is not a signatory to the Statement of Principles and that therefore, the Board's decisions would not be binding on the War Department." It has been held that the Board's interpretation of its decisions, as not binding upon non-signatories, is entitled to great weight. *Painter* v. *Southern Transportation Co.,* (E.D. Va., 1948) 80 F. Supp. 756.

B. *Appellants' overseas-service contract makes it plain that performance of overtime was contemplated and was ordinarily to be compensated only by compensatory time off.*

The language of appellants' overseas contract makes it equally plain that they were not entitled to any cash payments for overtime. Paragraphs 4 and 15 of the appellants' contract, with emphasis supplied, provide:

> 4. The Employee shall work whatever hours are required and overtime compensation, if any, may be allowed for work performed on Sundays, Saturday afternoons, holidays, or for extra hours during any day in excess of that normally considered a working day, only provided that payment for such overtime is in accord with the local prevailing practice. *It is hereby agreed and understood, however that the probable performance of such extra work by the Employee has been taken into consideration in establishing the wages specified above.*
>
> * * * * * * *
>
> 15. The provisions herein contained *shall be deemed to include and be the equivalent* of the prevailing employment conditions in the maritime industry.

The final sentences of Paragraphs 4 and 15 thus state that the parties were agreed that performance of overtime has already been taken into consideration in establishing the base wages with respect to the particular post of duty, that appellants were to work whatever hours were required "and overtime compensation, if any, may be allowed * * * *only provided* that payment for such overtime is in accord with the local prevailing practice" and that the contract rate of base pay was deemed to include the equivalent of that prevailing practice.

It is thus clear that the payment of overtime was entirely optional with competent War Department authority and was not contemplated for ordinary overtime but only for extraordinary situations. It *may* or may not be paid but in any event *only* if in accord with the prevailing local practice and since, as described by the correspondence with the Maritime War Emergency Board,

the only civilian-manned small craft operations in the European Theater were those of the Army Transportation Corps, the only local prevailing practice was that of the Transportation Corps itself which was stated in the contract and agreed in Paragraph 15 to be accepted as "the equivalent of the prevailing conditions in the maritime industry."

Again if the matter be ambiguous so as to require this Court to take judicial notice of the applicable regulations, the Marine Personnel Regulations of the Transportation Corps provide in Section 3 of Regulation 6 (copies of which in both the original version of July 1, 1944, and the revision of July 15, 1945, are printed in Appendix E, *infra,* pp. 62-65), the detailed application of the contract provision. These regulations in their 1944 version read:

> Seamen employed aboard vessels carrying inter-island rates of pay will be paid overtime on the same basis as similar personnel aboard transport class vessels. However, this requirement will not apply in Theaters of Operation in which the established practice does not provide for the payment of overtime compensation to seamen employed on such vessels permanently assigned to such overseas commands. * * * Seamen employed aboard small craft and auxiliaries assigned to overseas commands will be paid overtime compensation in accordance with the local comparable prevailing maritime practice.

They were in turn implemented by Circular No. 40, dated June 13, 1944, of the Office of the Chief of Transportation, E. T. O. U. S. A. (European Theater of Operations, U. S. Army), providing in Paragraph 1 d (4) (Appendix D, *infra,* pp. 68-69, and compare Circular No. 16, dated February 19, 1945, Paragraph 1 d (3), *infra,* pp. 69-71) that since extra work "was taken into consideration in establishing wage scales, overtime compensation will not be paid." Circulars 40 and 16 further prescribe in Paragraph 1 k (1) for compensatory time off, directing that—

> In the event it is necessary that the vessel and crew work beyond the 8-hour day, recompense will be made *wherever practicable, at the convenience of the Government, by means of time off on an equitable basis.*

And this was in accordance with the regular provisions of

statutes and regulations as to all civilian government employees.

The same principles apply in respect of appellants' claim, now apparently abandoned, for overtime during the period that they served on their vessels while in transit from the United States to the European Theater of Operations and any return therefrom. In both cases the court below, like the courts in the *Henderson* and *Jentry* cases, correctly held there was no right to overtime.

C. *Appellants' overseas-service contract gives them the same leave status as other civil-service employees and their pleadings and proof do not show they were not paid so far as entitled*

The claim that appellants are entitled to additional payments for sick leave is equally without foundation. Paragraph 9 of appellants' contract provides in pertinent part, with emphasis supplied, that—

> If the employee satisfactorily completes the provisions of this contract and is separated from the service without prejudice, *the employee shall continue in a pay status* beyond the actual date of separation from an active duty status to the extent of his accrued annual leave.

This states the whole of appellants rights which is the same as that of any other civil-service employee of the United States. No payment on account of accrued sick-leave not used was ever promised.

The leave regulations governing civil-service seamen of the Army Transport Service are in all respects the same as those applicable to all other government employees on the date in question. They are set forth in Executive Order 9414, dated January 13, 1944. Seamen on their terminal annual leave could be paid their basic wages only, exclusive of evaluated rates for subsistence and quarters or the bonus in lieu of voyage, area and vessel attack bonuses, which were, of course, applicable only in war zones. It was apparently conceded that appellants had received payment on account of accrued annual leave. (R. II: 52-53,

57.) For sick leave, neither their contract nor the regulations permitted payment.

For the foregoing reasons it is submitted that the court below, like the courts in the *Henderson* and *Jentry* cases, correctly held that, even if appellants had brought timely suit under the Public Vessels and Suits in Admiralty Acts, their claims had no merit but should be dismissed.

CONCLUSION

We believe the court below correctly held that the exclusive jurisdiction of appellants' suit was under the Public Vessels and Suits in Admiralty Acts and that it correctly dismissed the suit as not having been brought within the two-year limitation period of those Acts. We further believe the added holding of the court below that appellants' claims were contrary to the express language of their contracts is equally correct. We therefore respectfully submit that the decision of the court below, dismissing appellants' suit for both want of jurisdiction and on the merits, should be affirmed.

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APPENDIX A

JURISDICTIONAL STATUTES

1. The Suits in Admiralty Act provides in pertinent part (46 U. S. Code 742, 745):

> 742. In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States * * * provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *
>
> * * * * *
>
> 745. Suits authorized by this chapter may be brought only on causes of action arising since April 6, 1917: *Provided,* That suits based on causes of action arising prior to the taking effect of this chapter shall be brought within one year after this chapter goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises: * * *

2. The Public Vessels Act provides in pertinent part (46 U. S. Code 781, 782):

> 781. A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: * * *
>
> 782. * * * Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

3. The Tucker Act, as amended (28 U. S. Code 1346, 2401), provides in pertinent part:

> 1346. *United States as defendant.*
>
> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * * *

(d) The district courts shall not have jurisdiction under this section of:

(1) Any civil action or claim for a pension;

(2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States.

* * * * *

2401. *Time for commencing action against United States.*

(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

APPENDIX B

Statutes and Regulations Relating to Civil Service Appointments of Army Transport Seamen

1. The Constitution of the United States in Article II, Section 2, provides in pertinent part:

> * * * The Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

2a. Revised Statutes 169, as amended (5 U. S. Code 43), provides:

> There is authorized to be employed in each executive department * * * such number of employees * * * as may be appropriated for by Congress from year to year: *Provided,* That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons for duty in the field services of his department or establishment.

2b. Act of June 5, 1942, c. 340, s. 3, 56 Stat. 314 (50 U. S. Code Appx.) provides in pertinent part:

> 763. (a) The Secretary of War is hereby authorized to effect appointments of civilian employees in the United States, or to effect the transfer of such employees in the Federal Service in the United States, for duty at any point outside the continental limits of the United States or in Alaska at which it may be found necessary to assign such civilian employees, and to pay the costs of transportation of such employees from the place of engagement in the United States, or from the present post of duty in the United States or in Alaska, if already in the Federal Service, to the post of duty outside the United States and return upon relief therefrom, and to provide for the shipment of personal effects of persons so appointed or transferred from the place of engagement or transfer to the post of duty outside the continental United States or in Alaska and return upon relief therefrom.

3. Secretary of War's Orders M, August 14, 1942, provide:

> War Department,
> Washington, *August 13, 1942.*
>
> Orders:
>
> 1. The very rapid increase in the number of civilians required throughout the War Department to prosecute

the war effectively demands that personnel be obtained and put to work quickly. This will be facilitated by the establishment of simple procedures for completing personnel actions in the lowest operating echelons practicable, and by the operation of judicious controls to insure the maintenance of uniform standards.

2. The Office of the Secretary of War will take the necessary steps to decentralize to the proper operating units in both the departmental and field services of the War Department the processing of all personnel actions. In order to provide experienced personnel to the departmental and field services so that they can operate satisfactorily under this program, arrangements will be made prior to September 1 to transfer from the Office of the Secretary of War available personnel to the payrolls of the operating units, and the Office of the Secretary of War will upon request assist in training any additional persons required.

3. Authority is hereby delegated to the Commanding Generals, Services of Supply, Army Air Forces, and Army Ground Forces, to take final action on personnel transactions in the field service, except on separations with prejudice.

4. The Civilian Personnel Division of the Office of the Secretary of War will, through representatives stationed in the operating personnel offices of the departmental service, approve for the War Department the allocation of all classified positions and will review all instruments pertaining to personnel transactions prior to approval by the Secretary of War. In the field service, representatives of the Civilian Personnel Division of the Office of the Secretary of War will assure compliance in action taken under the above delegated authority with Departmental policies, standards, and procedures; Civil Service rules and regulations; Comptroller General's decisions; and established legal requirements; by the appropriate audit and inspection of such actions and will receive all appropriate information to effect the same.

5. These orders will be effective September 1, 1942. Orders N of December 23, 1941, Orders I of July 3, 1942, and any or all portions of any other orders or

memoranda conflicting with the provisions of these orders are rescinded as of September 1, 1942.

HENRY L. STIMSON,
Secretary of War.

M.
93-842

4. Services of Supply, Civilian Personnel Memorandum 18, August 19, 1942:

WAR DEPARTMENT

Headquarters, Services of Supply

Washington

August 19, 1942.

SPX 230.2 (8-17-42) SPGC-PS-M

S.O.S. CIVILIAN PERSONNEL MEMORANDUM No. 18

Subject: Delegation of authority for appointment and classification of civilian personnel.

To: Chiefs of Supply Services, Chief of Administrative Services, Commanding Generals, all Service Commands.

1. This is in reference to Orders M of the Secretary of War, dated August 13, 1942, decentralizing civilian personnel functions to the Commanding General, Services of Supply. The following authority and responsibilities are redelegated, effective September 1, 1942:

DEPARTMENTAL PERSONNEL

2. The chiefs of the supply services and the Chief of Administrative Services will be responsible for the administration of their classification programs, including the survey of civilian positions in their respective departmental services, the preparation of job descriptions, the determination of appropriate position allocations, and submission to the representatives of the Civilian Personnel Division, Office of the Secretary of War.

3. Each chief of a supply service and the Chief of Administrative Services are authorized to negotiate directly with the Civil Service Commission for eligibles for filling of their departmental vacancies, except that requisitions for typists, stenographers, messengers, and clerks, for posi-

tions of grade not higher than CAF 2, will clear through such central pools as may be in operation. On permission of the Civil Service Commission with respect to any particular position or positions, the respective services may recruit eligibles outside of registers, and negotiate with the Commission for authority to make appointments.

4. The several supply and administrative services will be responsible for the preparation of all papers or instruments necessary to effect departmental appointments or other civilian personnel changes, and the daily preparation of a journal of personnel actions and its transmission for approval through the representatives of the Civilian Personnel Division of the Office of the Secretary of War.

5. In order that the procedures and forms may be uniform throughout the Services of Supply, standard instructions will be issued from this headquarters.

FIELD PERSONNEL

6. Authority to make field appointments and to effect any other changes in status for civilian field personnel so far as consonant with laws, Civil Service rules, departmental regulations, approved tables of organization, and classification standards, is hereby delegated to the chiefs of supply services, the Chief of Administrative Services, and the commanding generals of service commands, except that termination with prejudice from any position must have prior approval of the Civilian Personnel Division, this headquarters, and of the Office of the Secretary of War.

7. The supply and administrative services and service commands through their field personnel offices, are authorized to negotiate directly with the Civil Service Commission respecting lists of eligibles, authority to appoint, and similar matters.

8. The authority to make appointments and other personnel changes, and the processing of all papers incident thereto should be transferred to the appropriate field units as soon as practicable following the issuance of standard instructions by this office and when personnel has been trained for handling of such functions.

9. In order to expedite the processing of personnel actions and at the same time obtain the greatest possible standardization of position classification throughout the Services of Supply, authority should be redelegated wher-

ever possible to appropriate field units to allocate the classification of field positions and to determine proper ranks, grades, and salaries of unclassified positions, subject to the following provisions:

a. Allocation may be made by reference to standard approved job descriptions by code or number, in lieu of writing individual job descriptions. Separate notices will be issued listing standard job descriptions which are approved for use in this connection.

b. For positions not described in approved standard job descriptions, individual job descriptions will be prepared, and the positions allocated in accordance with the approved tables of organization and classification standards.

c. All allocations based on either approved standard job descriptions or upon individual job descriptions made by field units will be subject to post audit or inspection, and revision by representatives of the respective chiefs of services, commanding generals of service commands, or by Headquarters, Services of Supply.

10. Processing of all personnel instruments and all actions taken under authority delegated above, including the allocations of classified positions, will be subject to post inspection by representatives of the Civilian Personnel Division of the Office of the Secretary of War, as provided in paragraph 4 of Orders M.

By command of Lieutenant General Somervell:

J. A. Ulio,
Major General,
Adjutant General.

Incl.
Orders M.

5. Chief of Transportation, Personnel Bulletin No. 12, October 7, 1942:

War Department

Office of the Chief of Transportation

Washington, D. C.

Personnel Bulletin
No. 12 October 7, 1942.

Delegation of Authority for Civilian Personnel Field Actions—I. Pursuant to authority delegated by the Secre-

tary of War in Orders "M" of August 13, 1942, to The Commanding General, Services of Supply, and to the authority delegated by him to the Chief of Transportation in his letter of August 19, 1942, authority is hereby delegated, effective October 15, 1942, to the Commanding Officers of: Ports of Embarkation, Port Agencies, Holding and Reconsignment Points, Transportation Agencies, and to the Senior Transportation Officer in exempted installations of other Services to take final action on appointments to, promotions (as distinct from reclassification) to, changes in status to, and terminations from, established positions, with the exception of terminations with prejudice. Authority to make permanent transfers between stations is not delegated.

II. The following procedure will be followed:

A. All field civilian personnel actions, including both graded and ungraded positions, will be taken by the completion of Form CP-50 *only*. Therefore, Forms CP-56 and CP-58 will be discontinued on effective date of this delegation.

B. The following distribution of the Forms CP-50 will be used:

1. Temporary Series: The original copy with two duplicates will be forwarded direct to the Office of the Chief of Transportation together with a statement on Form CP-50 as to the number of the position. In the Temporary Series, a copy will be forwarded by the station direct to the appropriate Civil Service Regional Director. The Commanding Officer will determine what additional copies are required for station files.

2. Permanent Series: The original copy and three duplicates will be forwarded to the Office of the Chief of Transportation together with a statement on Form CP-50 as to the number of the position.

3. A copy will be given to the employee.

4. It is important that the Form CP-50 be completed to show appropriate entries, *including the authority under which the position was established.*

5. The necessary appointment forms will be completed in the usual manner. These will include:

a. The Civil Service Regional Director:

(1) Form CP-57
(2) Fingerprint Chart No. 2390
(3) Medical Certificate No. 2413
(4) Form 2806-1
(5) Any other forms which may be required by the Civil Service Regional Director from time to time.

b. On Station File:

(1) Oath of Office Form CP-18
(2) Declaration of Appointee Form 124B

III. The authority herein delegated to Commanding Officers will be the direct responsibility of such officers and will be exercised by them in the Central Civilian Personnel Office of each station. All actions taken in accord with the above redelegation will be subject to post audit by the Office of the Chief of Transportation; by the Headquarters, Services of Supply; and, by the Office of the Secretary of War.

By Command of Major General Gross:

Fremont B. Hodson,
Colonel, Transportation Corps,
Assistant Chief of Transportation
for Administration.

Official:

Robert H. Soule,
Colonel, Transportation Corps,
Director of Administration.

6. Secretary of War's Civilian Personnel Circular No. 69, December 16, 1943:

War Department

Washington 25, D. C., 16 December 1943.

Civilian Personnel Circular
No. 69

Approval of personnel action—1. The approval of personnel actions must be exercised in accordance with the requirements of law and the Comptroller General's decisions. This circular is issued for the purpose of assuring

that personnel actions are effected in accordance with those requirements.

2. Civilian personnel actions must be approved by the officer of the installation who has specific written delegation of authority to approve. Such delegation must be from the Commanding General of the appropriate force or command, or from the commanding officer of the station to a subordinate pursuant to a specific written delegation authorizing the commanding officer to designate a subordinate to approve personnel actions.

3. Personnel actions are considered in two categories:

a. Administrative personnel actions, requiring approval on or prior to their effective date. For example, appointment, promotion, reassignment, transfer, demotion, removal, separation for inefficiency, separation for reduction in force, furlough for reduction in force, extension of temporary appointment, etc.

b. Confirmatory personnel actions, which are automatically effective without approval, but which are approved to make them official. For example, acceptance of resignation, military furlough, change in name, periodic within-grade promotion, etc.

4. Administrative personnel actions cannot be retroactively effective. They must be approved on or prior to their effective date, even though organization, classification, Civil Service, or other necessary approvals have been obtained before final administrative approval is given. Failure to comply with this requirement of law may result in exceptions in the accounts of disbursing officers for payments made in such cases.

5. Confirmatory personnel actions may be retroactively effective. The effective dates of such actions are set by circumstances beyond the control of the approving officer, and therefore do not constitute an administrative personnel action.

6. The Forms No. C. P.-50 (or AC, C. P.-50), Notification of Personnel Action, will be prepared for all personnel actions, except those where lists are used, such as for group wage adjustments, mass transfers, etc. (see CPR 35.14-5). For administrative personnel actions, the date of the Form No. C. P.-50 must be *on or prior to* the effective date of the action. In all cases, the pay roll copy of the Form No. C. P.-50 (or copy of the list in case of group

wage adjustments and mass transfers) will be submitted to the pay roll office, and will be used by the pay roll certifying officer as the basis for the pay transaction. The facsimile or typed signature of the approving authority on the pay roll copy will be sufficient evidence of official approval.

7. Forms No. C. P.-50 and AC, C. P.-50 are currently in process of revision and stocks of the present forms should not be procured for use beyond 30 April 1944.

8. This circular is applicable to all War Department employees within the continental limits of the United States. Further instructions regarding the approval of personnel actions outside the United States will be issued at a later date.

(A. G. 230 (16 Dec. 43).)

By order of the Secretary of War:

WM. H. KUSHNICK,
Director of Civilian Personnel and Training.

OFFICIAL:
J. A. ULIO,
Major General,
The Adjutant General.

7. Chief of Transportation, Circular 10-1, April 7, 1944:

Army Service Forces
Office of the Chief of Transportation
Washington, 7 April 1944.

TC Circular
No. 10-1

DELEGATIONS OF AUTHORITY

Approval of Personnel Actions

1. Pursuant to Civilian Personnel Circular No. 69, dated 16 December, 1943, as amended by Civilian Personnel Circular No. 29, dated 16 March 1944, the following officials are hereby authorized to approve personnel actions:

Port Commanders
Commanders of Sub-Ports and Staging Areas
Zone and District Transportation Officers
Commanders of Holding and Reconsignment Points
Chief, Field Service Group, Transportation Corps

The above named officials may further delegate this au-

thority to commanders of Transportation Corps installations under their jurisdiction.

2. Such officials may authorize in writing subordinates to sign personnel actions, "Forms CP-50". If a subordinate is authorized to sign personnel actions, he will sign his own name personally, "For the Commanding Officer", or "By order of the Commanding Officer". No person will be authorized to sign the subordinate's name except when such person is acting in the absence of the subordinate.

3. Personnel actions are considered in two categories:

a. Administrative personnel actions, requiring approval on or prior to their effective date. For example, appointment, promotion, reassignment, transfer, demotion, removal, separation for inefficiency, separation for reduction in force, furlough for reduction in force, extension of temporary appointment, etc.

b. Confirmatory personnel actions, which are automatically effective without approval, but which are approved to make them official. For example, acceptance of resignation, military furlough, change in name, periodic within-grade promotion, etc.

4. Administrative personnel actions cannot be retroactively effective. They must be approved on or prior to their effective date, even though organization, classification, Civil Service, or other necessary approvals have been obtained before final administrative approval is given. Failure to comply with this requirement of law may result in exceptions in the accounts of disbursing officers for payments made in such cases.

5. Confirmatory personnel actions may be retroactively effective. The effective dates of such actions are set by circumstances beyond the control of the approving officer, and therefore do not constitute an administrative personnel action.

6. The Forms CP-50, Notification of Personnel Action, will be prepared for all personnel actions, except those where lists are used, such as for group wage adjustments, mass transfers, etc. For administrative personnel actions, the date of the Form CP-50 must be on or prior to the effective date of the action. In all cases, the pay roll copy of the Form CP-50 will be submitted to the pay roll office, and will be used by the pay roll certifying officer as the basis for the pay transaction. The facsimile or typed

signature of the approving authority on the pay roll copy will be sufficient evidence of official approval.

(SPTPI)

C. P. GROSS,
Major General,
Chief of Transportation.

Official:

CLIFFORD STARR,
Colonel, Transportation Corps,
Chief, Administrative Division.

8. Secretary of War's Civilian Personnel Circular No. 29, March 16, 1944:

WAR DEPARTMENT,
Washington 25, D. C., 16 March 1944.

Civilian Personnel Circular
No. 29

Approval of personnel action.—Paragraph 2, Civilian Personnel Circular No. 69, 16 December 1943, is rescinded and the following substituted therefor:

2. Civilian personnel actions (Form CP-50, AC-CP-50) must be signed by the official of the installation who is authorized in writing to approve personnel actions. Such authority must originate from a delegation of authority from the commanding general of the appropriate force, service, or command to the official exercising the command function at the installation; such officials may authorize in writing subordinates (preferably by position title) to sign personnel actions provided the delegation from the force, service, or command authorizes such action. In any event, if a subordinate is authorized by an official in command to sign personnel actions, he must sign his own name personally "For the Commanding Officer," or "By Order of the Commanding Officer," etc. The subordinate will not authorize another individual to sign in his place, except when the individual is acting in his position because of his absence from duty.

(A. G. 230 (16 Mar 44).)

By order of the Secretary of War:

WM. H. KUSHNICK,
Director of Civilian Personnel
and Training.

Official:

J. A. ULIO,
Major General,
The Adjutant General.

9. Chief of Transportation, Circular 10-1, change No. 1, April 15, 1944:

Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C., 15 April 1944

TC Circular
No. 10-1
Change No. 1

DELEGATIONS OF AUTHORITY

Approval of Personnel Actions

Paragraph 1 of TC Circular 10-1, dated 7 April 1944, is hereby rescinded and the following substituted therefor:

1. Pursuant to Civilian Personnel Circular No. 69, dated 16 December, 1943, as amended by Civilian Personnel Circular No. 29, dated 16 March 1944, the following officials are hereby authorized to approve personnel actions:

Port Commanders
Commanders of Sub-Ports and Staging Areas
Zone and District Transportation Officers
Commanders of Holding and Reconsignment Points

The above named officials may further delegate this authority to commanders of Transportation Corps installations under their jurisdiction.

(SPTPI)

C. P. GROSS,
Major General,
Chief of Transportation.

Official:
CLIFFORD STARR,
Colonel, Transportation Corps,
Chief, Administrative Division.

APPENDIX C

Regulations Relating to Overtime and Overseas Bonus of Army Transport Service Seamen

1. Transportation Corps, Marine Personnel Regulations No. 6 (Overtime):

MPRTC 6.3 1-4

Section 3

Overtime for Crew Members Aboard Inter-Island Class Vessels and Small Craft

General Provisions

63.1 a. Seamen employed aboard vessels carrying inter-island rates of pay will be paid overtime on the same basis as similar personnel aboard transport class vessels. However, this requirement will not apply in Theaters of Operation in which the established practice does not provide for the payment of overtime compensation to seamen employed on such vessels permanently assigned to such overseas commands.

b. Seamen employed aboard small craft and auxiliaries assigned to overseas commands will be paid overtime compensation in accordance with the local comparable prevailing maritime practice. Similarly, seamen employed aboard small craft and auxiliaries in the States will be paid overtime compensation so as to conform with the local prevailing maritime practice.

When Provisions of Overtime Law Apply

63.2 Where no local prevailing wage or union agreements exist which reflect the local prevailing overtime rates and practices applicable to the small craft, overtime compensation will be paid on the basis of the overtime rates and conditions set forth in Public Law 49—78th Congress. Attention is invited to the fact that only in cases where no counterpart exists in prevailing maritime practice will personnel aboard such vessels be paid overtime compensation on a

similar basis as similar classes of shore personnel to whom the prevailing overtime laws apply.

Overtime Compensation for Ferrying Masters and Chief Engineers

63.3 Ferrying Masters and Chief Engineers assigned to small vessels for the purpose of insuring the safe and efficient delivery of vessels, will not be paid overtime compensation.

Overtime for Employees in Stand-by Pools

63.4 Employees in stand-by pools will not be worked overtime except in unusual or emergency work situations. However, where overtime work is authorized to be performed by such personnel, overtime compensation will be paid in accord with local prevailing maritime practice. In the absence of local prevailing maritime practice, such personnel may be compensated for overtime work in accord with the provisions of the overtime law applicable to shore personnel.

MPRTC 6.3 (Revised)
Change No. 3, 1 July 1945.

Section 3

Overtime for Crew Members Aboard Inter-Island Scale Vessels and Small Craft

General Provisions

63.1 Seamen employed aboard vessels carrying inter-island rates of pay will be paid overtime on the same basis as similar personnel aboard transport class vessels, subject to the following exceptions:

a. Where there are three officers or less in either the Deck or Engine Department, overtime compensation will be paid to the Master and Chief Engineer.

b. The foregoing requirements, however, will not apply in Theaters of Operation in which the established practice does not provide for the payment of overtime compensation to seamen employed on such vessels permanently assigned to such overseas commands. Seamen employed on such vessels shall be required to work whatever overtime hours are requested. The terms and conditions prevailing in the industry at the place where the work is performed shall determine whether or not overtime compensation will be paid.

Hours of Duty

63.2 Hours of duty for civilian marine personnel assigned to inter-island scale vessels and small craft will be established in written orders by the port, station, or, post commander concerned. In cases where such vessels are engaged in sea voyages, the applicable sea watches set forth in Section 2 of this Regulation may be implemented. The daily and weekly tours of duty will be set to conform with local prevailing maritime practice. In the absence of comparable local prevailing maritime practice, a regular weekly tour of duty of 40 hours may be established provided such tour of duty is in accord with operating considerations of the vessel. In cases where such tour of duty is not in accord with operating requirements, tours of duty on a basis other than that described above may be established, subject to approval by the Office of the Chief of Transportation.

Overtime Compensation

63.3 Where no local wage or union agreements or other prevailing practice exist which reflect the local prevailing overtime rates and practices applicable to small craft, overtime compensation will ordinarily be approved on the basis of straight time and one-half of the basic wage rates for work performed in excess of 40 hours per week. In some cases, the local prevailing practice may be that of the Army for a specialized type of operation requiring unusual tours of duty. The basis of overtime pay on whatever tour of duty is established requires the prior approval of the Office of the Chief of Transportation.

Overtime Compensation for Ferrying Masters and Chief Engineers

63.4 Ferrying Masters and Ferrying Chief Engineers

assigned to small vessels solely for the purpose of insuring the safe and efficient delivery of vessels, will not be paid overtime compensation.

Overtime for Employees in Stand-by Pools

63.5 Employees in stand-by pools will not be worked overtime except in unusual or emergency work situations. However, where overtime work is authorized to be performed by such personnel, overtime compensation will be paid in accord with local prevailing maritime practice. In the absence of local prevailing maritime practice, such personnel may be compensated for overtime work on the basis of time and one-half for work performed in excess of 40 hours per week.

2. Transportation Corps, Marine Personnel Regulations No. 11 (overseas bonus):

MPRTC 11.5 1-4

Section 5

Overseas Bonus—Special Applications

Definition

115.1 Overseas bonus is payable in lieu of all other war risk bonuses to crew members engaged under contract for overseas employment on vessels permanently assigned to a post of duty in such overseas commands.

Where Such Bonus is Payable

115.2 Such bonuses are presently payable to crew members assigned for permanent duty in the following Theaters of Operation, or employed under contracts so providing:

a. Southwest Pacific Area

b. European Theater of Operation

c. North African Theater of Operation

Amount of Bonus Payments Applicable in Such Areas

115.3 The amount of percentage increase in compensation in lieu of all other bonuses of any other character will be in accord with the percentage stipulated in the contract. Where no contract is executed, the percentage increase will be that set by the Chief of Transportation for that overseas command. Such additional compensation continues payable uninterruptedly from the time that the employee arrives at the assigned overseas post of duty and terminates upon his departure therefrom unless otherwise stipulated in the employment contract.

Effect of Such Bonus Provisions Upon Article Seamen

115.4 Such flat percentage increase in compensation in lieu of all other bonuses is applicable only to seamen who are appointed for permanent duty at overseas commands in which the Chief of Transportation has established such bonus practice. Accordingly, where the master, officers or crew members of a transport class vessel or any other type of vessel not permanently assigned to the theater of operation specified above, arrives at such area, the applicable war risk bonus set forth in sections 2, 3, and 4 of these Regulations continue payable subject to the conditions and limitations incident thereto, notwithstanding the fact that there are contract employees in such area who receive a flat increase in compensation in lieu of other war risk bonuses. However, where article employees or others are subsequently permanently assigned to that theater of operations for permanent duty, the established War Department bonus practice in that area will be applicable to all crew members who are so assigned to that theater of operations for permanent duty.

MPRTC 11.5 (Revised)
Change No. 3, 15 July 1945

Section 5

Overseas Bonus—Special Applications

Definition

115.1 Overseas bonus is a flat percentage increase in compensation, payable, in lieu of all other war risk bonuses, to crew members engaged under contract for overseas employment on vessels permanently assigned to such overseas commands.

Where Such Bonus is Payable

115.2 Such bonus is presently payable to crew members assigned to permanent duty in the following Theaters of Operations, or employed under contracts so providing:

a. Southwest Pacific Area

b. Pacific Ocean Areas

c. European Theater of Operation

d. North African Theater of Operation

Amount of Bonus Payments Applicable in Such Areas

115.3 The amount of percentage increase in compensation will be set by the Chief of Transportation at a rate to approximate and to be payable in lieu of the voyage, area and vessel attack bonuses as set forth in Sections 2, 3, and 4 of this Regulation. Such percentage increase in compensation, in lieu of all other war risk bonuses, will be subject to adjustment from time to time to conform with changes in war hazards as reflected in Decisions of the Maritime War Emergency Board as approved and adopted by the War Department. Such percentage increase in compensation continues payable uninterruptedly from the time the employee arrives at his assigned overseas post of duty and terminates upon his departure therefrom, unless otherwise stipulated in the employment contract.

Effect of Such Bonus Provisions Upon Article Seamen

115.4 Such flat percentage increase in compensation in lieu of all other bonuses is applicable only to seamen who are appointed for permanent duty at overseas commands in which the Chief of Transportation has established such bonus practice. Accordingly, where the master, officers or crew members of a transport class vessel or any other type of vessel not permanently assigned to the theater of operation specified above, arrives at such area, the applicable war risk bonus set forth in Sections 2, 3, and 4 of these Regula-

tions continue payable subject to the conditions and limitations incident thereto, notwithstanding the fact that there are contract employees in such area who receive a flat increase in compensation in lieu of other war risk bonuses. However, where article employees or others are subsequently permanently assigned to that theater of operations for permanent duty, the established War Department bonus practice in that area will be applicable to all crew members who are so assigned to that theater of operations for permanent duty.

3. European Theater of Operations, Office of the Chief of Transportation, Circulars relating to Civilian Vessel Employees:

HEADQUARTERS, COMMUNICATIONS ZONE ETOUSA, OFFICE OF THE CHIEF OF TRANSPORTATION, APO 887

Circular No. 40

13 June 1944.

WAR DEPARTMENT CIVILIAN EMPLOYEES WITH TRANSPORTATION CORPS

1. The administrative procedures and policies as set forth herein will govern War Department Civilian Employees on duty with the Transportation Corps ETOUSA. All previous instructions issued by this office are rescinded.

a. General:

(1) War Department Civilian Employees assigned to the Transportation Corps are attached to the 5th Group Regulating Stations (TC), and will be placed on detached service with ports as required, and as directed by the Chief of Transportation, by orders issued by the Commanding Officer, 5th Group Regulating Stations (TC).

* * *

d. *Pay:*

* * *

(4) Inasmuch as extra work by War Department civilian employees was taken into consideration in establishing wage scales, *overtime compensation will not be paid.*

* * *

k. *Working Day:*

(1) While at sea, the working day will be such

as is necessary to perform the duties required and maintain the safety of the vessel. When operating within the Port Area, an eight (8) hour day, six (6) day week will be maintained, insofar as operations permit. In the event it is necessary that the vessel and crew work beyond the eight (8) hour day, recompense will be made wherever practicable, at the convenience of the Government, by means of time-off on an equitable basis.

(2) Personnel not actually assigned to duty aboard ship may be employed in connection with the maintenance of these vessels as directed by the Port Captain.

* * *

FRANK S. ROSS,
Brigadier General, U.S. Army,
Chief of Transportation.

OFFICIAL:
(S.) SAMUEL A. DECKER,
Colonel, T.C.,
ACOT-Administration.

HEADQUARTERS, COMMUNICATIONS ZONE ETOUSA, OFFICE OF THE CHIEF OF TRANSPORTATION, APO 887

Circular No. 16

19 February 1945.

WAR DEPARTMENT CIVILIAN EMPLOYEES WITH TRANSPORTATION CORPS

1. The administrative procedures and policies as set forth herein will govern War Department Civilian Employees, TC, on duty with the Transportation Corps, ETOUSA. Circular No. 40, OCOT, 13 June 44, is hereby rescinded.

a. General:

(1) War Department Civilian Employees, TC, assigned to the Transportation Corps are attached to the 5th Group Regulating Station, TC, and will be placed on detached service with ports as required, and as directed by the Chief of Transportation, by

orders issued by the Commanding Officer, 5th Group Regulating Station, TC, APO 413, U. S. Army.

* * *

d. *Pay.*

* * *

(3) Inasmuch as extra work by War Department Civilian Employees, TC, was taken into consideration in establishing wage scales *overtime compensation will not be paid.* 100% Bonus is paid in lieu of all other bonuses.

(4) WD Civilian Employees, TC, will be paid base wages only during periods of hospitalization or sick in quarters in accordance with provisions of employment contract.

* * *

k. *Working Day.*

(1) While at sea, the working day will be such as is necessary to perform the duties required and maintain the safety of the vessel. When operating within the Port Area, an eight (8) hour day, six (6) day week will be maintained, insofar as operations permit. In the event it is necessary that the vessel and crew work beyond the eight (8) hour day, recompense will be made wherever practicable, at the convenience of the Government, *by means of time off on an equitable basis.* Certification of overtime will be made by Port Captain, and time off approved by CO, 5th Group Regulating Station, TC, or in case of emergency by Port Commander.

(2) WD Civilian Employees, TC, not actually assigned to duty aboard ship may be employed in connection with the maintenance of these vessels.

* * *

p. *Awards*

(1) Recommendations for awards and decorations to WD Civilian Employees, TC, will be handled in accordance with AR 600-45, Current Theater Directives and letter, Hq 5th Group Regulating Station,

TC, 200.6, 6 Feb. 45, subject, Awards and Decorations, WD Civilian Employees, TC.

FRANK S. ROSS,
Major General, U. S. Army,
Chief of Transportation.

OFFICIAL:
(s.) SAMUEL A. DECKER,
Colonel, TC,
ACOT-Administration.

APPENDIX D

Decisions of the Maritime War Emergency Board on the Question of Bonus Payable to Army Transport Service Seamen

War Department, Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C.

5 August 1943.

Maritime War Emergency Board,
Commerce Building,
Washington, D. C.

Attention: Mr. Baldwin.

Dear Mr. Baldwin:

With the assistance of the Recruiting and Manning Organization of the War Shipping Administration, the Transportation Corps of the Army is engaged in a very large recruiting program for marine personnel on boats smaller than the transport class owned or operated by the War Department, assigned for duty to the South and Southwest Pacific Area.

While it is understood that the Maritime War Emergency Board Decisions 2a and 4a are not applicable to operators of small craft, personnel recruited for such duty are necessarily procured in a competitive market with respect to those employed on boats to which these Decisions do apply. The War Department, it is believed, will constitute the largest operator of boats in the areas to which reference is made, and it is the prevailing practice in that area, as evidenced by contracts of employment between the War Department and such marine personnel, to pay a one hundred per cent bonus over base pay without either Port Attack Bonus, Area Bonus, or the Voyage Bonus, as set forth in the Decisions referred to. Informal discussions with representatives of the War Shipping Administration, RM&O, and your organization indicate the desirability of amending these Decisions to correspond to the generally-prevailing practice in such areas. Accordingly, it is recommended that Maritime War Emergency Board Decisions 2a and 4a be amended, providing substantially as follows:

"All boats permanently assigned to a post of duty in which the Area Bonus, under Decision No. 2a of the

Maritime War Emergency Board, is applicable, except those engaged in trans-oceanic voyages, will not receive an Area Bonus.

"All boats permanently assigned in a combat area, and in cases where such boats regularly make ports of call within such combat area, except those engaged in trans-oceanic voyages, will not receive or be eligible for the Port Attack Bonus.

"In lieu thereof, on boats permanently assigned in a combat area, a flat one hundred per cent bonus increase of wages will be paid to the personnel employed on such boats, which will be deemed the equivalent of, and in lieu of, all other types of bonus payments."

The foregoing recommendation is the considered opinion of representatives of commanders in such areas, and it is believed will be satisfactory to all concerned. For that reason, it is urged that a formal decision be promulgated relating specifically to such areas so that uniformity of bonus payments may be achieved.

This office will be glad to discuss this matter with the representative of your organization at greater detail, if such should be deemed desirable.

Sincerely,

ALEXANDER COREY,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)
[undated]

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

Your letter of August 5, 1943 to Mr. Baldwin, concerning certain Army operations in the Australian area and your request for a Board ruling concerning bonus payable on such operations, has been submitted to the Board and considered by them.

You will recall that shortly after the outbreak of the war between the United States and the Axis powers, a series of conferences was held between the various maritime unions and the steamship operators of the American merchant marine. These conferences culminated on December 19, 1941 in the execution of an agreement known as the Statement of Principles.

The Statement of Principles provided for the creation of the Maritime War Emergency Board, the members of which were to be designated by the President of the United States. The signatories gave mutual assurances against strikes, stoppages of work, and lockouts; and agreed that all matters relating to war risk compensation and war risk insurance would be settled on a uniform basis by the Board; and that the Decisions of the Board were mandatory on the parties signatory.

The Maritime War Emergency Board has issued nine decisions concerning the payment of war risk compensation (bonuses and detention and repatriation benefits), concerning reimbursement for loss of personal effects and concerning insurance benefits (loss of life and disability). These decisions have been modified from time to time to meet changes arising in the course of the war. The Board has also issued several thousand interpretations or rulings with respect to matters involving specific situations. In fact, its decisions and rulings have met with general acceptance by the maritime industry.

The War Department is not a signatory to the agreement, and, therefore, is not bound by the action of the Board.

The decisions which the Board has issued were designed primarily to cover commercial operations of the American merchant marine. As you indicate in your letter, the operation involved is not a marine operation but rather an operation of a quasi-military nature, and compliance with the existing decisions of the Board would introduce additional complications in an already complex operation.

The Board does not believe that it should issue a decision covering the matter. However, your attention is invited to the processes which were followed in the formulation of the several bonus decisions and it is suggested that such processes be adopted wherever possible in the interests of uniformity.

The Board appreciates your suggestion and stands ready to render any assistance by decision within its authority

or by mutual consultation looking toward general stabilization of the war risk bonus and insurance structure.

Sincerely yours,

ERICH NIELSEN,
Secretary.

WAR DEPARTMENT, ARMY SERVICE FORCES
Office of Chief of Transportation
Washington 25, D. C.

25 September 1943.

Maritime War Emergency Board,
Department of Commerce Building,
Washington, D. C.

Attention: Mr. J. G. Baldwin

GENTLEMEN:

Recently this office had requested a decision from the Board with respect to the applicability of the Maritime War Emergency Board Decisions to operations in the Southwest Pacific Area. This office was advised that the decisions issued by the Board were designed primarily to cover commercial operations, and that since the operations in that area were of a quasi-military nature, the proposed practice of paying a flat 100% bonus, in lieu of all other types of bonuses authorized by the Board, would not be in conflict with the Board's Decisions or prevailing practice.

Operations of small boats assigned to the Panama Canal Department evidence the desirability of implementing a similar practice in view of the similarity of operations between the Panama Canal Department and the Southwest Pacific Area. It is proposed that a flat 75% bonus be paid to crew members employed on all such boats which are permanently assigned to the Panama Canal Department in all cases where such vessels are engaged in operations involving the regular and continuous transmitting through the Canal on both the Atlantic and Pacific sides. Such bonus provisions would be applicable in all those cases where such boats regularly make ports of call in the area as far west as the Galapagos Islands, as far east as Recife including all the northern ports along the northern coastwise boundaries of Central and South America, and as far

north as the northern boundaries of the Caribbean Sea and the West Indies as now defined in your Decisions.

Based upon the nature of the operations herein described, therefore, decision of the Board is requested as to whether the proposal outlined above would be in accord with the Decisions of the Maritime War Emergency Board governing the payment of war bonuses, and whether there is any comparable prevailing practice contrary thereto.

Your cooperation in this matter is indeed appreciated.

Sincerely,

ALEXANDER COREY,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)

October 15, 1943.

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

This is in response to your letter of September 25, 1943, concerning the operation of certain small Army vessels in the Panama Canal Zone Area.

You state that the operations involved concern the same special type of small vessel being operated in the Southwest Pacific and that the operations are virtually the same. The Board recognizes the fact that there are no comparable commercial operations in the area. The Board also recognizes that the Army is not a signatory to the Statement of Principles, and therefor, that its decisions would not be binding on the Army.

Sincerely yours,

ERICH NIELSEN,
Secretary.

War Department, Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C.

6 December 1943.

Maritime War Emergency Board,
Department of Commerce Building,
Washington, D. C.

Attention: Mr. J. G. Baldwin

Gentlemen:

Present military operations in the European Theater require the immediate permanent assignment of small vessels to be crewed by civilian marine personnel. The operations of such vessels will be quasi-military in nature and will be confined primarily to short coastal voyages.

In view of present combat activities in that area, it is essential that administration of personnel matters be kept to an absolute minimum consistent with operating requirements. It is, therefore, proposed to pay a flat 100% increase in compensation in lieu of any other applicable bonuses of any other character.

In that connection, your attention is invited to the fact that your previous informal decisions authorizing a similar practice in the Southwest Pacific Area and the Panama Canal Department recognized that there were no comparable commercial operations in those areas which would conflict with such practices. Your attention is further invited to the fact that operations of the War Department vessels in the European Theater will not be commercial in nature and the vessels will be of a type and class in no wise comparable to merchant vessels.

It is the desire of the Chief of Transportation to follow the prevailing maritime practices as reflected by the Decisions of the Maritime War Emergency Board in all cases where permitted by statutes pertaining to civil service employees. It is understood that the Maritime War Emergency Board Decisions 2A and 4A are not applicable to operators of small craft such as those to be assigned to the European Theater of Operation. Nevertheless, it is the policy of this office to implement only such practices which will not conflict with those prevailing in the maritime industry.

Your decision is therefore respectfully requested as to whether there are any comparable commercial operations in the European Theater of Operations on the type of vessel

and the type of mission to which the War Department vessels and crews will be assigned. Your prompt decision in this matter will greatly assist this office in determining the adaptability of the proposed method of effecting bonus payments to local prevailing practice.

Sincerely,

ALEXANDER COREY,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

MARITIME WAR EMERGENCY BOARD
Department of Commerce Building
Washington (25)

December 8, 1943.

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

DEAR COLONEL COREY:

This will acknowledge your letter of December 6, 1943, relative to certain operations of small vessels by the War Department in the European Theater of Operations. You state that the operations involved cover the same special type of small vessels operated by you in the Southwest Pacific and the Panama Canal Areas referred to in your letters to us of August 5 and September 25, 1943. Decisions 2 A and 4 A of the Board apply to small vessels operated by Signatories of the Statement of Principles except where such operations are conducted wholly or principally within inland waters. The Board recognizes, however, that there are no comparable commercial operations in the European Theater of Operations on the type of vessel and the type of mission to which you advise the War Department vessels and crews are to be assigned. The Board also recognizes that the War Department is not a Signatory to the Statement of Principles and that, therefore, the Board's Decisions would not be binding on the War Department.

Sincerely yours,

ERICH NIELSEN,
Secretary.

War Department, Army Service Forces
Office of the Chief of Transportation
Washington 25, D. C.

December 9, 1943.

Mr. J. G. Baldwin,
Maritime War Emergency Board,
Department of Commerce Building,
Washington, D. C.

Dear Mr. Baldwin:

This will confirm telephone conversation had this date with Captain Rothouse of this office with respect to the letter addressed to the Maritime War Emergency Board, dated December 6, 1943, and the reply thereto, dated December 8, 1943. It is understood that the reference to the European Theater of Operations in your reply was intended to embrace the Mediterranean Area and the waters of North Africa.

Inasmuch as the operations described in the letter from this office will be conducted in the waters of Africa as well as Europe, your decision is again respectfully requested as to whether the reply of December 8, 1943, which recognizes that there are no exact comparable commercial operations, may be construed as applying to the waters of Africa as well as the waters of Europe.

Your cooperation in this matter is indeed appreciated.

Sincerely,

Alexander Corey,
Lt. Col., Transportation Corps,
Chief, Civilian Personnel Division.

Maritime War Emergency Board
Department of Commerce Building
Washington (25)

December 10, 1943.

Lt. Colonel Alexander Corey,
Chief, Civilian Personnel Division,
War Department, Army Service Forces,
Office of the Chief of Transportation,
Washington, D. C.

Dear Colonel Corey:

This will acknowledge your letter of December 9, 1943, referring to the reference to the European Theatre of Operations as covered by our letter of December 8, 1943 on small vessel operations to be conducted by you.

This will confirm your understanding that in referring to the European Theatre Operations the Mediterranean Area and the waters of North Africa are included.

Sincerely yours,

Erich Nielsen,
Secretary.

APPENDIX E

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

DANNY RAYMOND JENTRY, Libelant

v.

UNITED STATES OF AMERICA, Respondent

In Admiralty No. 5816-WM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on to be heard before the Honorable Wm. C. Mathes, Judge presiding, upon the pleadings and proofs, and having been argued and submitted to the Court for decision, the Court after due deliberation having rendered its decision directing a decree dismissing the Amended Libel herein on the merits with costs to the respondent, United States of America, the Court now makes the following

Findings of Fact

I

That at all times mentioned in the Amended Libel the United States of America was the owner and operator of the following named United States Army Transports and Tugs: FP 143, H 9, C 35884, ST 386, ST 408 and TP 103.

II

That the said libelant was employed by the United States of America as an able-bodied seaman in the Army Transport Service for a period of one year commencing April 6, 1944, pursuant to a written contract executed by the libelant, Danny Raymond Jentry, and the respondent, United States of America, dated April 6, 1944, and provided in paragraph 4 thereof as follows:

> "The Employee shall work whatever hours are required and overtime compensation, if any, may be allowed for work performed on Sundays, Saturday afternoons, holidays, or for extra hours during any day in excess of that normally considered a working day, only provided that payment for such overtime is in accord with the local prevailing practice. It is hereby agreed and understood, however, that the prob-

able performance of such extra work by the Employee has been taken into consideration in establishing the wages specified above."

III

That the libelant entered into his duties under said contract on the 6th day of April, 1944 and was assigned to the Southwest Pacific Theatre of Operations, which is West of the 180th Meridian, and did perform his duties under said contract in said area until and including the 30th day of March, 1945 for a period of 359 days.

IV

Having found as hereinabove set forth, it is true that the respondent during all of the times of employment of the libelant, or otherwise, did not agree to or indicate in any manner that it would pay overtime for the services rendered by the libelant, and that the regulations of the Army Transport Service did not provide for the payment of overtime, nor was there any local prevailing practice in the area in which libelant served for paying overtime on the types of vessels upon which libelant performed his services herein; that the hours of overtime which libelant claims to have worked under the said contract were contemplated and taken into consideration in establishing the wages specified in said contract; that the said terms and provisions are unambiguous, and libelant understood all the terms and provisions of said contract prior to the execution thereof and during the rendering of the services by him thereunder.

V

That the libelant is not entitled to recover any sum whatsoever from the respondent.

VI

That at all times mentioned in the Amended Libel the libelant was an American seaman and within the designation of a person entitled to sue without furnishing bond for, or prepayment of, or making any deposit to secure costs for the purpose of prosecuting suits in admiralty.

VII

That the libelant made no claim and proffered no evidence in support of paragraph Seventh of the Amended Libel,

and each and all of the allegations therein contained are not true.

VIII

It is true that the libelant at all times mentioned in his Amended Libel, and up to and including the time of the filing of this suit, was a resident of the Southern District of California within the jurisdiction of this Court.

IX

That each and all of the allegations set forth in libelant's Amended Libel inconsistent with these findings of fact are untrue.

Conclusion of Law

1. Libelant is not entitled to recover from the respondent, United States of America, and the Amended Libel should be dismissed upon its merits.

2. Respondent, United States of America, is entitled to judgment and decree for its costs of suit incurred.

Dated: January 31, 1949.

Wm. C. Mathes,
United States District Judge.

APPENDIX F

Unreported Decisions Applying the Tucker Act Exceptions to Suits by Civil Service Employees

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United States District Court, Eastern District of Arkansas, Western Division

David J. Brown, et al., plaintiffs-intervenors

v.

United States of America, defendant

L. R. Civil Action 1772

Appearances: K. E. Phipps and Mrs. Neva B. Talley, of Little Rock, Arkansas, for Plaintiffs-Intervenors. James T. Gooch, United States Attorney and Mr. G. D. Walker, Assistant U. S. Attorney, for the Defendant.

Trimble, Judge.

The plaintiff and intervenors, hereinafter referred to as plaintiffs, bring this action to recover overtime payments which they allege are due them from the United States Government. They rely upon the Tucker Act, 28 U.S.C. 1346(2), formerly 28 U.S.C. 41 (20).

Briefly the facts are that during the parts of the years 1941, 1942 and 1943, while the United States had control and management of the municipal Airport at Little Rock, and operated it under the direction of the U. S. Army, the plaintiffs were employed as civilian guards with civil service status as "War Service Indefinite" employees. It is their contention that during a portion of the years named above they received only an annual salary although they were required to and did work extra hours for which they received no pay.

Among other defenses it is the contention of the government that the plaintiffs were officers of the United States within the exception to the Tucker Act in 28 U.S.C. 1346, (d) (2), and that the district court has no jurisdiction of this action. That section of the statute reads:

> "(d) The district courts shall not have jurisdiction under this section of: . . .
>
> (2) Any civil action to recover fees, salary, or compensation for official services of officers of the United States."

In Sect. 2 of Article II of the United States Constitution provision is made for the appointment of officers of the United States. After setting forth the method and authority for appointing major officers it provides:

> "but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law or in the Heads of Departments."

The plaintiffs were not appointed by the President, nor by a court of law, and to be officers must of necessity have been appointed by the head of a department. In the case of United States v. Germaine, 99 U. S. 508, 510, the Supreme Court held:

> "The term Head of A Department means, in this connection, the Secretary in charge of a great division of the executive branch of the Government, like the State, Treasury, War, who is a member of the Cabinet."

Neither the importance of the task, the amount of compensation, nor the duties to be performed is determinative of whether the employee of the government is an "officer" within this exception in the Tucker Act. Surrowitz v. United States, 80 Fed. Supp. 718, note 2. In Burnap v. United States, 252 U. S. 512, 516, the Supreme Court said:

> "The distinction between officer and employee in this connection does not *reat* upon differences in the qualifications necessary to fill the positions or in the character of the services to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto. (Citing cases)."

Pursuant to the provisions of the Sect. 2, Art. III of the Constitution, quoted hereinbefore, the Congress provided statutory authority for appointments in the Act of 26 June 1930 (46 Stat. 817; 5 U.S.C. 43). This act authorized employment of such number of employees as may be appropriated for by Congress from year to year, with the further proviso:

> "That the head of any department or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to

employ such persons for duty in the field service of the department or establishment.''

Adams Field, the municipal airport at Little Rock, at which plaintiffs were employed, (previously known as the Quartermaster Motor Supply Depot and as the Little Rock Ordnance Depot), was a field installation of the War Department. The positions of civilian guard personnel at such installations were filled by appointment under War Service Regulations V published in War Department Administrative Memorandum No. 27, April 30, 1942, and preceding regulations. The plaintiffs were appointed at a stated annual salary to be paid out of regular appropriations made available to the Department, and they were assigned to duties prescribed by competent authority.

The War Service Regulations were promulgated by the Civil Service Commission under authority conferred upon it by Executive Order No. 9063. Such regulations provided for two types of service for persons appointed after March 15, 1942: * * * (2) those which were denominated as ''indefinite'' appointments which were without limit except they could not continue beyond ''the duration of the war and six months thereafter.'' Type (1) of service not being applicable here.

Under the authority of this, other and later regulations the plaintiffs were employed by the United States, and worked under the control and direction of a Department of the United States Army and the War Department. As evidence of this the original plaintiff, David J. Brown has introduced as an exhibit, the letter appointing him as ward attendant, and which is signed by an officer who signs as a Lieutenant Colonel, Medical Corps, Surgeon. There is also in evidence a document showing his transfer from such ward attendant to patrolman, a position similar to that in which he alleges his claim for overtime arose. This document bears the notations: ''Action taken under War Service Regulation IX, Section 6c * * * By order of the Secretary of War.'' To all intents and purposes the intervenors were appointed under similar regulations if not the same. There can be no doubt but that they were appointed by authority of the Secretary of War, who is ''The Head of a Department.''

This view is supported, by any number of cases decided by the Supreme Court, Courts of Appeal and District Courts, many of which will be found cited and discussed very ably in Kennedy v. United States, 146 Fed. 2d, 28.

The plaintiffs lay great stress upon the holding of the

Supreme Court in United States v. Hartwell, supra, wherein it is said:

> "An officer is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."

The court, of course, agrees fully with this statement, yet the court cannot give to these terms the exact and fine distinction claimed for them. It is sufficient to say that these plaintiffs held their positions by appointment of government, for an indefinite period (the war and six months thereafter), which actually lasted for several years, were assigned to duties which had been prescribed by competent authority, and were paid a fixed annual salary.

The claims of the plaintiffs are of the character of claims dealt with by the Tucker Act of March 3, 1887, 28 U.S.C. 1346 (2), and would be maintainable in the district courts, if Congress had not seen fit to expressly withhold consent to sue the government on such claims. This exception, if applicable, is applicable to every grade of employee, and as the court must hold these plaintiffs to be officers of the United States within the exception, the exception will apply to them. United States v. Hartwell, supra; Kennedy v. United States, supra. This last case contains a very full and able discussion of the cases sustaining this view.

The court being of the opinion that the plaintiffs were officers of the United States, within the purview of Section 2 Article II of the Constitution, and within the exception in the Tucker Act, 28 U.S.C. 1346(d)(2), the court is without jurisdiction to hear the action.

There are other questions raised by the motion for summary judgment, and arguments advanced, but in view of the decision reached by the court, the court will not pass upon the other issues.

Counsel for the government will prepare praecipe for summary judgment in accordance with this memorandum and the rules of court.

Filed June 23, 1949. Grace Miller, Clerk. By H. B.-D.C.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK

DR. NEATHA V. BOLIN, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT

Civil Action, No. 3737

Appearances: Wilbur F. Knapp, of Bath, N. Y., for plaintiff. George L. Grobe, U. S. Attorney (James R. Privitera, of counsel), both of Buffalo, N. Y., for defendant.

KNIGHT, Chief District Judge:

Plaintiff in his complaint alleges that he is a resident of Bath, N. Y. and brings this action under Tucker Act, 28 U.S.C., sec. 41(20), to recover overtime pay under 50 U.S.C., appendix, secs. 1401-1415; that he was employed by defendant as neuropsychiatrist at Veterans Facility, Bath, N. Y. and there rendered services as "Officer of the Day" in excess of 48 hours a week for which he was not paid nor given compensatory time off from May 11, 1943 to and including February 22, 1944, a total of 352 hours, for which he should have been paid $531.66; that due and legal claim for said pay was filed with General Accounting Office and denied on or about December 18, 1947. He demands judgment for $531.66, with interest from February 23, 1944.

The action was commenced April 11, 1948. Defendant has moved to dismiss the complaint (1) for lack of essential allegations required by 28 U.S.C., sec. 265; (2) that plaintiff is an "officer" within meaning of Tucker Act rather than an "employee" and therefore this court has no jurisdiction.

Annexed to notice of motion is the affidavit of George H. Sweet, Ass't Administrator for Personnel, Veterans' Administration, Washington, D. C., verified May 16, 1949, who narrates the phases of plaintiff's employment and concludes:

"By virtue of his appointment in the Veterans Administration, as aforesaid, Dr. Bolin is considered as an officer of the United States within the meaning of Section 1346(d)(2), Title 28, United States Code Annotated."

Plaintiff, in opposition, submits an affidavit, verified by him June 1, 1949, in which he alleges that from January

16, 1939, to February 23, 1943, he was employed by defendant at said hospital as "ward physician. I was in Civil Service status at the time * * * and was not in any sense of the word actually or constructively an officer of the United States. On February 23, 1943, I was commissioned as Major in the Army * * * and continued to serve as such for the balance of time pertinent to this cause of action. I had no commission in the Veterans Administration and was strictly under the rules and regulations as laid down by the Civil Service Commission and was subject to all of the laws governing overtime payment for Civil Service employees." In his annexed Exhibited A, plaintiff sets forth the details of overtime from May 11, 1943, to February 22, 1944, totaling 352 hours. He states the hourly rate of overtime pay in excess of 48 hour week was $1.51041 and that amount of overtime compensation due is $531.66432.

Defendant, in its brief, asserts: "The brief will deal solely with the question of jurisdiction. No attempt will be made to argue the merits or demerits of the plaintiff's claim. Briefly, it is the contention of the government that, if the plaintiff has any claim at all, he should commence action in the proper forum, to wit, the Court of Claims and not the United States District Court. The government's position is that the plaintiff is in the proper church but the wrong pew."

28 U. S. C., sec. 41(20)—the Tucker Act—repealed by Act June 25, 1948, effective September 1, 1948, provided in part:

> "Nothing in this paragraph shall be construed * * * as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purposes by persons claiming as such officers * * *."

The same limitation is found in the revised Judicial Code—28 U.S.C., sec. 1346 (d)(2)—which became effective September 1, 1948.

Was plaintiff an "officer of the United States" during the time specified in his complaint?

Title 1, section 1 of U. S. C., dealing with General Provisions, declares: "In determining the meaning of any Act of Congress, unless the context indicates otherwise—'officer' includes any person authorized by law to perform the duties

of the office." (Amendment of July 30, 1947). Prior to the amendment, the section read: "In determining the meaning of any Act or resolution of Congress * * * the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense."

These definitions are incomplete because the term "office" is left undefined.

In United States v. Mouat, 124 U. S. 303, decided in 1887, the court said:

> "What is necessary to constitute a person an officer of the United States, in any of the various branches of its service, has been very fully considered by this court in United States v. Germaine, 99 U. S. 508. In that case, it was distinctly pointed out that, under the Constitution of the United States, all its officers were appointed by the President, by and with the consent of the Senate, or by a court of law, or the head of a Department; and the heads of the Departments were defined in that opinion to be what are now called the members of the Cabinet. Unless a person in the service of the Government, therefore, holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. We do not see any reason to review this well established definition of what it is that constitutes such an officer." p. 307.

In that case, a paymaster's clerk, appointed by a paymaster in the navy with the approval of the Secretary of the Navy, was held not to be an officer entitled to traveling expenses.

War Overtime Pay Act of 1943, being 50 U. S. C. Appendix, secs. 1401-1415, terminated on June 30, 1945. Sec. 1401 thereof provided:

> "This Act shall apply to all civilian officers and employees (including officers and employees whose wages are fixed on a monthly or yearly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose * * *."

Certain exceptions are listed not pertinent to this case.

Section 1402 provided for the computation of overtime compensation. The Act, however, did not declare in what tribunal such claims might be brought nor did it define the terms "civilian officers", "officers" or "employees."

From the aforesaid affidavit of George H. Sweet, submitted by defendant, it appears that plaintiff, on January 16, 1939, "was probationally appointed as Associate Medical Officer, Grade P & S-3, $3200 per annum, from a certificate of Civil Service eligibles, for a course of training at the Veterans Administration Hospital, Hines, Illinois * * * by Frank T. Hines, Administrator of Veterans Affairs. Thereafter, effective June 16, 1939, (he) was transferred to the Veterans Administration Hospital, Coatesville, Pennsylvania and, effective March 16, 1940, he was promoted to P & S-4, $3800 per annum. On October 1, 1940, he was transferred to the Veterans Administration Hospital, Bath, New York. On February 9, 1942, he was promoted to Senior Medical Officer, P & S-4, $4600 per annum. He remained in this position at the same grade and salary until on March 21, 1944, he was commissioned in the Medical Corps, Reserve, of the United States Army, and assigned to and continued to serve at the Veterans Administration Hospital at Bath, New York, as a psychiatrist with the rank of Major and later with the rank of Lieutenant Colonel."

The Veterans' Administration was established by Executive Order No. 5398, July 21, 1930, pursuant to authority granted by 28 U. S. C. sec. 11. Section 11a provides:

> "There shall be at the head of the Veterans' Administration an administrator to be known as the Administrator of Veterans' Affairs, who shall be appointed by the President, by and with the advice and consent of the Senate."

38 U. S. C., sec. 426, provides in part:

> "All officers and employees of the Veterans' Administration shall perform such duties as may be assigned them by the Administrator. All official acts performed by such officers or employees specially designated therefor by the Administrator shall have the same force and effect as though performed by the Administrator in person."

No distinction is made between officer and employee nor are the terms defined.

The U. S. Supreme Court in Burnap v. United States, 252 U.S. 512, decided in 1920, holding that a landscape architect in the Office of Public Buildings and Grounds is not an officer but an employee, said:

> "The distinction between officer and employee in this connection does not rest upon difference in the qualifications necessary to fill the positions or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto." p. 516.

Defendant in its brief declares: "No reported case involving a claim for fees, salary or compensation under the Tucker Act has dealt with a claim by a person holding a position in an independent department of the government not headed by a cabinet member." Plaintiff's counsel in his brief admits that the only case he could find that is absolutely in point is an unpublished memorandum of U. S. District Judge Matthew M. Joyce, dated March 25, 1945, of U. S. District Court, District of Minnesota, Fourth Division in the case of "Dr. Edward F. Ducey, Plaintiff, v. United States of America, Defendant." In that case Dr. Ducey sued under the War Overtime Pay Act of 1943 and was awarded $60.42 for 40 hours overtime. The memorandum states that defendant "moved to dismiss on the ground that the plaintiff was an officer of the United States and that therefore this court had no jurisdiction under the Tucker Act." The court, however, in the memorandum did not discuss this objection. It appears that no appeal was taken from the decision.

Article II, sec. 2 of the U. S. Constitution "confers upon the President the power to nominate, and with the advice and consent of the Senate to appoint, certain officers named and all other officers established by law whose appointments are not otherwise therein provided for; but it authorizes Congress to vest the appointment of inferior officers either in the President alone, in the courts of law or in the heads of departments (6 Op. Atty. Gen. 1)." Burnap v. United States, 252 U. S. 512, 514-515, supra.

The Constitution did not establish any department or define the term. It did not provide for a cabinet. There are now 11 Departments in the Executive Branch of our national Government (5 U.S.C. sec. 1) but only 9 heads of departments having cabinet status. Since July 26, 1947,

there are separate Secretaries of the Departments of the Army, Navy and Air Force but they have no cabinet rank, that being reserved to the Secretary of Defense. It would follow from the definition in United States v. Mouat, 124 U. S. 303, supra, that commissioned officers of any of the three military departments are not "officers of the United States".

In United States v. Germaine, 99 U. S. 508, it was held that the Commissioner of Pensions was not the head of a department within the meaning of Art. II, sec. 2 of the U. S. Constitution and that a civil surgeon appointed by him was not an officer of the United States.

Some recent cases, however, give the term "head of a department" a broader connotation. It is also given a broader meaning in 5 U.S.C., sec. 662.

In United States v. Marcus (C.A.A. 3d), 166 F. 2d 497, appellant-defendant, supervisory investigating officer in the office of OPA, was indicted for accepting a bribe. It was held that he was an officer of the United States. The court said:

> "We agree to the proposition that an officer of the United States is one appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law or the head of some executive department of the government. See Art. II, section 2, of the Constitution. The defendant was not appointed by the President, hence the immediate inquiry is whether the party appointing him was the head of a department. * * * In the instant case the steps are as follows: The President was given power under the Emergency Price Act to appoint the Price Administrator, by and with advice and consent of the Senate; the Price Administrator was to direct the Office of Price Administration set up by Congress, and to receive a set salary; he is given power by the Act to appoint assistants to carry out his duties. Defendant, as an appointee thereunder, is an officer of the United States. The OPA was set up as an emergency department of the Executive with far-reaching control, and it is our opinion that it constitutes an executive department of government within the requirements herein mentioned. * * * The cases of United States v. Germaine, supra (99 U. S. 508), and Burnap v. United States, 252 U. S. 512 * * *, are distinguishable, for in both of them the defendants were clearly employees and not officers." p. 503.

The Emergency Price Control Act of 1942 did not specifically designate the OPA an executive department. 38 U.S.C., sec. 11, designates the Veterans' Administration as an "establishment."

In United States v. Holmes (C.C.A. 3d), 168 F. 2d 888, another OPA investigator was indicted and tried for extortion and bribery. The court, affirming the conviction, said:

> "Defendant has contended that an investigator of the OPA is neither an officer of the United States nor a person acting on behalf of the United States in an official capacity within the meaning of the bribery statute. Criminal Code sec. 117, 18 U.S.C.A. sec. 207. The mere recital of this argument is enough to discredit it." p. 891.

Plaintiff, in the instant case, was appointed by Frank T. Hines, Administrator of Veterans' Affairs, who was the head of a department. "The term 'department' means an executive department of the United States Government, a governmental establishment in the executive branch of the United States Government which is not a part of an executive department. * * * The term 'the head of the department' means the officer or group of officers in the department who are not subordinate or responsible to any other officer of the department." 5 U.S.C. sec. 662.

A physician is ordinarily deemed an independent contractor and not an employee. Metzger v. Western Maryland Ry. Co. (C.C.A. 4th), 30 F. 2d 50, 51. See Matter of Turel v. Delaney, 171 Misc. (N.Y.) 962. As physician, he exercises an independent calling.

I therefore conclude that plaintiff, during the period for which he claims overtime compensation, was an "officer of the United States" within the meaning of the Tucker Act—28 U.S.C. sec. 41 (20), now 28 U.S.C. sec. 1346 (d)(2). Plaintiff's complaint is hereby dismissed.

Filed December 1, 1949.

District Court of the United States, Middle District of Alabama, Northern Division

Claud W. Owens, plaintiff,

vs.

United States of America, defendant

Civil No. 354-N

Kennamer, Judge:

Plaintiff, Claud W. Owens, brought this suit against the United States of America, for wages or salary he alleges the defendant is due to pay him for overtime work while he was a civilian employee of the War Department of the United States.

The plaintiff invokes the jurisdiction of this court under section 41, subdivision 20, of the United States Code Annotated.

The defendant, United States of America, by the United States Attorney for this district, filed its motion to dismiss the said cause out of this court for lack of jurisdiction, averring that suit is for fees, salary, or for compensation for official services of officers of the United States, as is prohibited in subdivision 20 of said section.

Oral argument on the motion to dismiss was heard by the court, and certain documentary evidence exhibited to the court, from which the court finds that this plaintiff and others were employed by authority of the Secretary of War, after being found to possess proper qualifications as the result of a Civil Service examination as fire fighters, a position authorized by the Secretary of War. The Plaintiff was appointed at a stated annual salary and subscribed to the usual oath of office.

It appears to this court that this case, as made out by plaintiff's complaint and the evidence before the court, comes clearly within the decision of the United States Circuit Court of Appeals, 5th circuit, in the case of Kennedy v. United States, 146 F. 2d 26.

It is, therefore, ordered, adjudged and decreed that the motion to dismiss the said complaint is granted, and said complaint is dismissed, and the plaintiff is taxed with the cost of this suit, for which execution may issue.

Filed December 12, 1945. O. D. Street, Jr., Clerk. By Annie Schoolar, Deputy.

United States District Court, Southern District of California, Central Division

Dr. James A. Winsberg, plaintiff

v.

United States of America, et al., defendants

No. 9662-WM Civil

Order on Defendants' Motion to Dismiss

This cause having heretofore come before the court for hearing on the motion of defendants to dismiss the complaint for want of jurisdiction over the persons of the defendants; and the motion having been heard and submitted for decision; and it appearing to the court:

(a) that the plaintiff invokes the jurisdiction of this court under the provisions of the Tucker Act of March 3, 1887 [28 U.S.C. § 1346, formerly 28 U.S.C. § 41(20)];

(b) that the plaintiff seeks by this action to recover compensation for his official services as an "officer of the United States" within the Meaning of the Tucker Act [*United States* v. *Hartwell,* 73 U. S. 385, 393 (1867); *Kennedy* v. *United States,* 146 F. (2d) 26 (C.C.A. 5th, 1944); *Oswald* v. *United States,* 96 F. (2d) 10 (C.C.A. 9th, 1938); cf. *United States* v. *Marcus,* 166 F. (2d) 497, 503 (C.C.A. 3rd, 1948)];

and

(c) that in the Tucker Act the Congress has expressly withheld consent to sue the Government in the court on claims for "fees, salary, or compensation for official services of officers of the United States" [28 U.S.C. § 1346 (d)(2)];

defendants are accordingly entitled as a matter of law, to a judgment dismissing this action for want of jurisdiction of this court over the persons of the defendants;

It Is Now Ordered:

(1) that defendants' motion to dismiss, filed July 5, 1949 be and is hereby granted; and

(2) that counsel for defendants submit judgment dismissing this action for want of jurisdiction over the persons of the defendants, pursuant to local rule 7 within five days.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail on the attorneys for the parties appearing in this cause.

November 30, 1949.

Wm. C. Mathes,
United States District Judge.

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